

United States

Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record. (IN TWO VOLUMES.)

CONTINENTAL AND COMMERCIAL TRUST AND
SAVINGS BANK, a Corporation, and FRANK
H. JONES, Trustees,

Appellants,

vs.

COREY BROS. CONSTRUCTION COMPANY, a Cor-
poration, and UNION PORTLAND CEMENT
COMPANY, a Corporation,

Appellees.

VOLUME I. (Pages 1 to 320, Inclusive.)

Upon Appeal from the United States District Court for the
District of Idaho, Southern Division.

FILED

APR 22 1913

Received from U.S. Geodetic
Survey 8/15



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names and Addresses of Attorneys of Record.]

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Attorneys for Defendants.

[Bill of Complaint.]

*In the Circuit Court of the United States in and for
the District of Idaho, in the Ninth Circuit.*

IN EQUITY.

COREY BROS. CONSTRUCTION COMPANY, a
Corporation,

Plaintiff,

vs.

BIG LOST RIVER IRRIGATION COMPANY,
a Corporation, THE AMERICAN TRUST
AND SAVINGS BANK, a Corporation, and
FRANK H. JONES,

Defendants.

To the Honorable Judges of the Circuit Court of the
United States in and for the District of Idaho,
in the Ninth Circuit, Sitting in Equity:

Corey Bros. Construction Company, a corporation
organized and existing under and by virtue of the
laws of the State of Utah, a citizen of the State of
Utah, brings this its bill against the Big Lost River
Irrigation Company, a corporation organized and

existing under and by virtue of the laws of the State of Idaho, and a citizen of the State of Idaho, and The American Trust and Savings Bank, a corporation organized and existing under and by virtue of the laws of the State of Illinois, and a citizen of the State of Illinois, and Frank H. Jones, a citizen of Chicago, State of Illinois, and thereupon your orator complains and says: [1*]

That your orator Corey Bros. Construction Company is now, and was at all the times hereinafter set out, a corporation organized and existing under and by virtue of the laws of the State of Utah, and is now, and was at all the times hereinafter set out, a resident and citizen of the State of Utah, and that the defendant Big Lost River Irrigation Company is now, and was at all the times hereinafter set out, a corporation organized and existing under and by virtue of the laws of the State of Idaho, and is now, and was at all the times hereinafter set out, a resident and citizen of the State of Idaho, and that the defendant The American Trust and Savings Bank is now, and was at all the times hereinafter set out, a corporation organized and existing under and by virtue of the laws of the State of Illinois, and is now, and was at all the times hereinafter set out, a resident and citizen of the State of Illinois, and that the defendant Frank H. Jones is now, and was at all the times hereinafter set out, a resident and citizen of the city of Chicago, State of Illinois, within the meaning of the laws fixing and determining the jurisdiction of this Honorable Court.

*Page-number appearing at foot of page of original certified Record.

Your orator further shows unto your Honorable Court that at all the times hereinafter mentioned your orator has transacted business and carried on operations as a contractor, in its corporate name and capacity, in the counties of Custer, Blaine, Bingham and Fremont, State of Idaho, and at all the times hereinafter set out had accepted the provisions of the Constitution, and had complied with the laws of the State of Idaho, relative to foreign corporations doing business within said State.

Your orator further shows unto this Honorable Court that on or about the 26th day of August, 1909, the defendant, Big Lost River Irrigation Company, entered into a written contract with your orator for the furnishing of labor and certain materials in the construction of its canal system, together with the clearing, [2] bond plowing, excavation of canals, drain ditches, excavating waterways, waste ditches, building dams, reservoirs, riprap and pumping water, which system is and was known as the "Big Lost River Irrigation System."

And your orator further shows unto this Honorable Court that according to the terms of said contract, your orator was to furnish all labor and part of the materials required to construct an earth dam, diversion works, tunnel, canals, concrete structures for said irrigation system, all in accordance with plans and specifications prepared by the engineer for said company. That the construction of said work was under the supervising engineer of the defendant Big Lost River Irrigation Company, and that the time for the completion of said work was to be before

May 1st, 1910, unless your orator should be prevented from completing said work, by reason of strikes, inevitable accident or casualty, the act of God, or for any cause over which your orator had no control. That your orator was to receive for the work done upon said dam and canal system the following prices, to wit:

Earth and gravel, to construct dam, \$0.25 per cubic yard.

Tunnel excavation at dam, \$5.00 per cubic yard.

Tunnel excavation in canal, \$6.00 per cubic yard.

Riprap per square yard (not hand laid), \$1.00.

Concrete of all kinds and structures, \$12.00 per cubic yard.

Driving piling, cost plus 10%.

Solid rock excavation, \$1.50 per cubic yard.

Loose rock excavation, \$.50 per cubic yard.

Earth excavation in canal, \$.16 per cubic yard.

Clearing sage brush, \$6.00 per acre.

Lumber, in place, \$40.00 per thousand. [3]

Wet excavation below river level, cost plus 10%.

Wash gravel, or 90% pure gravel, \$.25 per cubic yard.

Pumping of all kinds, cost plus 10%.

Any extra work ordered by Engineer, cost plus 10%.

Riprap, hand laid, \$1.00 per sq. yard.

Plus 110% cost of laying.

All material furnished by contractor, except lumber, cost of haul plus 10% cost of material.

The same classification of materials shall hold as stated in specifications for Mackay dam.

On canal construction, the length of free haul shall be 200 feet, measured from center of gravity of embankment to center of gravity of excavation. An allowance of 1½ cts. per cu. yd. per 100 ft. overhaul shall be made.

For hauling cement from the nearest railroad station to the dam site, the contractor shall be allowed \$1.50 per ton; but all cement for canals shall be hauled by the contractor free.

Your orator further shows unto this Honorable Court that 90% of the cost of the materials furnished and work done should be paid to it by the defendant Big Lost River Irrigation Company, on or before the 10th day of each calendar month, for all work done during the preceding calendar month, and that said payments should be made on the estimates of the engineer of the amount of work done and material furnished.

Your orator further shows unto this Honorable Court that in pursuance of said contract of employment, it performed the following work: [4]

Work Done on Canals to Date.

Force account and extra work cost plus

10%	.....	\$38,490.47
Earth excavation	1,306,914.3 cu. yds. @	
16¢	.....	209,106.28
Gravel excavation	542,531.2 cu. yds. @ 25¢	135,632.80
Loose rock excavation	147,940.3 cu. yds.	
@ 50¢	.....	73,970.15
Solid rock excavation	239,414.9 cu. yds.	
@ 1.50	.....	359,122.35
Clearing 938.82 acres 6.00	.....	5,632.92

6 *Continental & Commercial etc. Bank et al.*

Concrete 3,282.09 cu. yds. @ 12.00.....	39,385.08
Concrete (reinforced) 3,445.49 cu. yds. @ 12.50	43,068.63
Riprap, hand laid, 11,192.13 sq. yds. @ 1.00	11,192.13
Bridging 227,031.2 40.00 per thousand..	9,081.25
Tunnel excavation 1,146.8 cu. yds. @ 6.00	6,880.80
Riprap, not hand laid, 476.2 sq. yds @ 1.00	476.20

	\$932,039.06

Work Done on Mackay Reservoir Dam to Date.

Force account and extra work, cost plus 10%	17,130.65
Tunnel excavation portals, 24,162. cu. yds. 50¢	12,081.00
Tunnel excavation portals, 2,304. cu. yds. 1.50	3,456.00
Cut-off trench 1,544. cu. yds. @ 25¢.....	386.00
Core-wall excavation 390 cu. yds. @ 25¢.	97.50
Tunnel excavation 2,487.5 cu. yds. @ 5.00	12,437.50
Earth embankment 479,908.0 cubic yds. @ 25¢.....	119,977.00
Loose rock embankment 9,000. cu. yds. @ 50¢	4,500.00
Concrete core-wall 2,080.2 cu. yds. @ 12.00	24,962.40
Spillway excavation 5,855. cu. yds. @ 1.50	8,782.50
Concrete in tunnel and around outlet pipes 1755.2 cu. yds. @ 12.00.....	21,062.40

Concrete on face of Dam	763.8 cu. yds.	
12.50	.....	9,547.50
Coffer Dam embankment	18,537. cu. yds.	
25¢	.....	4,634.25
Spillway tunnel excavation	554.3 cu. yds.	
5.00	.....	2,771.50

		\$241,826.20

For materials furnished on dam and canals to date, consisting of cement, timber, bolts, nails and hardware.... 41,149.78

[5]

Making a total for work done and materials furnished of..... \$1,215,015.04

Your orator further shows that all of said amounts are computed from the estimates made by the engineer in charge of said work.

Your orator further shows unto this Honorable Court that while said written contract was not signed until the 26th day of August, 1909, that your orator commenced work on the 15th day of June, 1909, and that all of said work done from the 15th day of June, 1909, up to and including the 26th day of August, 1909, was done at the special instance and request of the said defendant Big Lost River Irrigation Company, and under and pursuant to the terms of the contract which bears date August 26th, 1909, and that said contract, while it was not signed until August 26th, 1909, the terms of said contract were in full force and effect on the 15th day of June, 1909.

Your orator further shows unto this Honorable Court that the defendant Big Lost River Irrigation

Company has failed, neglected and refused to make the payments to your orator as is required by said contract, and has failed, neglected and refused to make said payments to your orator from the 10th day of February, 1910, and on account of the neglect, refusal and failure of the said defendant Big Lost River Irrigation Company to make said payments, as provided in said contract, your orator has been compelled to stop work, and to discontinue furnishing materials and labor upon the irrigation system known as the Big Lost River Irrigation Company's system. That the failure to complete said canal system provided for in said contract has been entirely due to the fault and negligence of the said Big Lost River Irrigation Company in not performing its part of the contract as hereinbefore set out, and also in not furnishing material as agreed upon and also on account of the failure of the engineer in charge to make surveys and cross-sections of said work. [6]

Your orator further says that the said defendant Big Lost River Irrigation Company, had due notice of the performing of all the work and labor, and the furnishing of all the said materials, and the same was done, performed and furnished by your orator in the construction of said canal system, according to the terms of said contract.

Your orator further shows unto this Honorable Court that it has done work and furnished materials in the aggregate sum of \$1,215,015.04, and that it has been paid upon said claim the sum of \$689,398.09, and no more, and there is now due and owing to your orator, on account of said work and labor done and

materials furnished, the sum of \$525,616.95, together with interest as hereinafter set out.

Your orator further shows unto this Honorable Court that on or about the 20th day of August, 1910, the same being less than 90 days after the last work done and materials furnished, your orator filed for record in the office of the County Recorder of Blaine, Bingham, Custer and Fremont Counties, Idaho (those being the counties where said work was done), a statement containing notice of intention to hold and claim a lien, and a description of the property to be charged therewith, name of the owner or reputed owner, and name of the person by whom your orator was employed to do the work, with a statement of the terms and conditions of its contract, and an abstract of its indebtedness, showing the whole amount of the debt, and whole amount of credit, and the balance due or to become due to your orator, which statement was duly verified in accordance with law; that a copy of said statement or mechanic's lien is hereto attached to this bill, marked Exhibit "A," and is hereby referred to and is made a part of this bill of complaint, as though the same were fully set out in the body of this complaint.

Your orator further shows unto this Honorable Court that said statement or mechanic's lien was filed with the County Recorder [7] of Bingham County, State of Idaho, on the 25th day of August, 1910; in the County Recorder's office of Fremont County, State of Idaho, on the 23d day of August, 1910; in the County Recorder's office of Blaine County, State of Idaho, on the 20th day of August, 1910; in the

County Recorder's office of Custer County, State of Idaho, on the 27th day of August, 1910.

Your orator further shows unto this Honorable Court that the Big Lost River Irrigation Company had due notice of the performance of all of said work, and labor, and furnishing of all material, and that same was done, performed and furnished in the construction of said canal system, at the special instance and request of said defendant Big Lost River Irrigation Company.

Your orator further shows unto this Honorable Court that the property sought to be foreclosed under said mechanic's and contractor's lien so made and filed by your orator is as follows:

All of the following lands in Custer County, State of Idaho: The Northeast Quarter of the Southeast Quarter (N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$) of Section Three (3), Lot Three (3) of Section Four (4), the Southeast Quarter of the Northeast Quarter (S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$) of Section Five (5), the Northwest Quarter of the Northwest Quarter (N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$) and the South Half of the Northwest Quarter (S. $\frac{1}{2}$ N. W. $\frac{1}{4}$) of Section Eleven (11), Township Seven (7) North, Range 23 East; the Southwest Quarter (S. W. $\frac{1}{4}$) of Section Thirty-three (33), Township Eight (8) North, Range Twenty-three (23) East, Boise Meridian, in all 405.25 acres, more or less.

All the reservoirs, dams, canals, ditches, laterals, head-gates, coulees, draws, flumes, rights of way and of flowage, easements, permits, privileges and franchises for dams, reservoirs, canals, ditches and laterals, and, in general, the entire irrigation works,

project, and system in Blaine, Bingham, Custer and Fremont Counties, State of Idaho, commonly known as the Big Lost River Irrigation System, and any addition or extension thereto, [8] now constructed by the company, or which it may hereafter construct or acquire, together with all franchises and powers, privileges and appurtenances connected therewith.

All the right to divert and use the waters of the Big Lost River and Antelope Creek in the State of Idaho, and all other rights under the following permits:

Permit No. 1507, to appropriate the waters of Big Lost River and its tributaries to an amount equivalent to a continuous flow of one thousand (1,000) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho in Book 5 of Permits, at page 1507.

Permit No. 1513, to appropriate the waters of Antelope Creek to an amount equivalent to a continuous flow of one hundred (100) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho in Book 5 of Permits, at page 1513;

Permit No. 1748, to appropriate the waters of Big Lost River and its tributaries to an amount equivalent to a continuous flow of two hundred (200) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho in Book 6 of Permits, at page 1748;

Permit No. 4061, being an amendment to Permit No. 1507, to appropriate the waters of the Big Lost River and its tributaries, as the same is of record in

the office of the State Engineer of the State of Idaho, in Book 11 of Permits, at page 4061.

Permit No. 4062, being an amendment of Permit No. 1513, to appropriate the waters of Antelope Creek, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 11 of Permits, at page 4062;

Permit No. 4063, being an amendment to Permit No. 1748, to appropriate the waters of the Big Lost River and its tributaries, [9] as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 11 of Permits, at page 4063.

Permit No. 4946, to appropriate the waters of Big Lost River and its tributaries to an amount equivalent to a continuous flow of one thousand (1,000) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 14 of Permits, at page 4946.

Permit No. 4,960, to appropriate the waters of Antelope Creek to an amount equivalent to a continuous flow of five hundred (500) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 14 of Permits, at page 4,960.

That certain right of way for the Big Lost River Reservoir, situated in Townships 7 and 8, North, Range 23 East, Boise Meridian, Custer County, State of Idaho, approved by the Acting Secretary of the Interior, August 2d, 1906, for a more particular description of which reservoir reference is hereby made to the map and field-notes thereof filed in the United States Land Office at Hailey, Idaho, on the

first day of August, 1905, and to the field-notes of the survey thereof, with witness points and witness corners of Townships 7 and 8, North, Range 23 East, Boise Meridian, filed in said office July 13th, 1908; and to the amended map and amended field-notes showing the definite location of said reservoir, filed in the United States Land Office at Hailey, Idaho, on the 18th day of June, 1909.

That certain right of way for the Big Lost River Canals, situated in Townships 3, 4, 5 and 6 North, Ranges 25, 26 and 27 East, Boise Meridian, in Blaine and Custer Counties, State of [10] Idaho, approved by the Acting Secretary of the Interior August 2d, 1906, for a more particular description of which right of way reference is hereby made to the map and field-notes thereof, filed in the United States Land Office at Hailey, Idaho, on the first day of August, 1905.

That certain right of way for the Lower Big Lost River Reservoir in Sections 21 and 28, Township 3 North, Range 27 East, Boise Meridian, approved by the Secretary of the Interior on April 27, 1906, for a more particular description of which reservoir reference is hereby made to the map and field-notes thereof, filed in the United States Land Office at Hailey, Idaho.

That certain right of way for the Lower Big Lost River Canals, situated in Township 3 North, Range 27 East, Boise Meridian, in Blaine County, State of Idaho, approved by the Commissioner of the General Land Office by letter F, dated April 20th, 1906, for a more particular description of which

right of way reference is hereby made to the map and field-notes thereof, filed in the United States Land Office, at Hailey, Idaho.

That certain right of way for the Antelope Reservoir situated in Township 4 North, Range 24 East, Boise Meridian, in Blaine and Custer Counties, State of Idaho, application for which was filed in the United States Land Office, Hailey, Idaho, on June 18th, 1909, for a more particular description of which reservoir reference is hereby made to the map and field-notes thereof filed in said land office on said day.

All the rights, grants, interests, privileges, easements and franchises acquired by the company under or in that certain contract dated May 27th, 1909, made by and between the State of Idaho, through its State Board of Land Commissioners, and George S. Speer, and by said George S. Speer, transferred and assigned to the company, for the construction of an irrigation system and works for the reclamation under the provisions of the Carey [11] Act of approximately one hundred thousand (100,000) acres of land in the Big Lost River Valley in the counties of Custer, Blaine, Bingham, and Fremont in the State of Idaho; as well as under any similar contract that may be made between the State of Idaho and the company, and any amendment to the above-mentioned present contract, for the construction of irrigation works and systems in Idaho under the Carey Act constituting extensions or additions to its said present system.

All the contracts heretofore made by the company, or its predecessors in interest, or which may be here-

after entered into by the company with settlers for the sale of water rights for water to be taken from or through said irrigation system, as the same is now or may be hereafter constituted, and all mortgages, constituting, to the extent of the unpaid portion of the purchase price of such water rights, first liens on the land irrigated thereunder.

All right, title and interest in and to said Idaho State Desert Land List No. 31, and the proposition made by said George S. Speer under the name of G. S. Speer to the State Board of Land Commissioners for the irrigation of the lands mentioned in said list.

Your orator further shows unto this Honorable Court that it has fully kept and performed its part of said agreement and contract, and fully performed the labor and furnished the materials required of it.

Your orator, upon information and belief, alleges that under and by virtue of a certain deed of trust, dated July 1st, 1909, and recorded in the office of the County Recorder of Bingham County on the 3d day of September, 1909, and also recorded in Blaine County on the 3d day of September, 1909, and also recorded in Fremont County on the 4th day of September, 1909, and also recorded in the County Recorder's office of Custer County [12] on the 8th day of September, 1909, the defendant The American Trust and Savings Bank, a corporation, and Frank H. Jones, are, or attempted to be, made trustees for the defendant Big Lost River Irrigation Company, for the intent and purpose of granting to and authorizing The American Trust and Savings Bank and Frank H. Jones, as such trustees,

authority to secure and obtain a loan, and to authorize the issuing of two million dollars' worth of bonds. That under and by virtue of said deed of trust the said defendant Big Lost River Irrigation Company, as your orator is informed and believes, and therefore alleges the fact to be, conveyed to The American Trust and Savings Bank and Frank H. Jones, as such Trustees, all its right, title, claim and interest in and to said canal system, lands, rights of way and appurtenances, and being the property, or a portion of the property covered by your orator's said lien and hereinbefore described. Your orator further shows, upon information and belief, that said trust deed was not acknowledged until after the 26th day of August, 1909, and was not filed for record until after the 2d day of September, 1909.

And your orator further shows unto this Honorable Court that whatever right, title, claim or interest may be created by said deed of trust, or now had or held by The American Trust and Savings Bank and Frank H. Jones, as trustee, is subsequent, inferior and subject to the lien and claim of your orator herein. Your orator further alleges that said property as herein described is not separable, nor can the same be used, sold or realized upon in any other way than as an entirety.

Your orator further shows unto this Honorable Court that it has been compelled to and has employed counsel, and that for the services of said counsel in preparing said lien herein and foreclosing the same, that the sum of \$40,000.00 is a reasonable attorney's fee to be allowed herein.

Your orator further shows unto this Honorable Court that the last work done upon said canal by it was on the 15th day of August, 1910, and that by reason of the failure and neglect of [13] the said defendant Big Lost River Irrigation Company, to pay to your orator the sums of money due, that is to say, 90% on the 10th of each month for all work done for the preceding month, that there is due for interest as follows: On \$20,687.30 from February 10th, 1910, to August 15th, 1910, and on \$10,004.95 from March 10th, 1910, to August 15th, 1910, and legal interest on \$62,047.77 from April 10th, 1910, to August 15th, 1910, and legal interest on \$117,212.65 from May 10th, 1910, to August 15th, 1910, and legal interest on \$118,855.30 from June 10th, 1910, to August 15th, 1910, and legal interest on \$93,042.91 from July 10th, 1910, to August 15th, 1910.

Your orator further shows unto this Honorable Court that the system known as the Big Lost River Irrigation system is incomplete; that is to say, that the dam at Mackay is about half completed, and about 90% of all the ditches and canals are completed.

Your orator further shows unto this Honorable Court that the dam at Mackay, Idaho, is at this time in such condition that more money should be spent about it, in order to protect the work that has already been done.

Your orator further shows unto this Honorable Court that the Big Lost River Irrigation Company is insolvent, and unable to pay its debts, and that a receiver should be appointed for said corporation.

Your orator further shows unto this Honorable Court that no proceedings at law have been had, nor any suit or action commenced for or on behalf of your orator for the principal or interest due upon the claim owed by the defendant Big Lost River Irrigation Company, to your orator, except only this action.

In consideration whereof, and inasmuch as your orator is remediless in the premises at and by the strict rules of the common law, and are only relievable in a court of equity, where matters of this kind are properly recognizable and relievable, your [14] orator therefore prays the aid of this Honorable Court that the mechanic's lien hereinbefore set out may be decreed to be a lien upon all the property of the defendant Big Lost River Irrigation Company, as described in said lien within the jurisdiction of this Honorable Court. That the said defendant Big Lost River Irrigation Company may be decreed to pay unto your orator the amount due upon the contract as hereinbefore set out and as secured by said mechanic's lien, to wit, the sum of \$525,616.95, together with legal interest thereon from the 15th day of August, 1910, together with interest upon the following amounts: On \$20,687.30 from February 10th, 1910, to August 15th, 1910, and on \$10,004.95 from March 10th, 1910, to August 15th, 1910, and on \$62,047.77 from April 10th, 1910, to August 15th, 1910, and on \$117,212.65 from May 10th, 1910, to August 15th, 1910, and on \$118,855.30 from June 10th, 1910, to August 15th, 1910, and on \$93,042.91 from July 10th, 1910, to August 15th, 1910, together with \$40,000.00 attorney's fee, and all costs and ex-

penses incurred and expended, and in default thereof that the said Big Lost River Irrigation Company, and all persons claiming under it, or either of them, may be forever debarred and foreclosed from all equity of redemption and claim of, in and to the said premises, and every part and parcel thereof, and all and singular the premises as covered by said mechanic's lien, with all the appurtenant property and effects, rights and franchises in said mechanic's lien mentioned, may be sold under a decree of this Honorable Court, and that out of the money arising from the sale thereof, after deducting from the proceeds of such sale just allowance for all disbursements and expenses of the said sale, including attorney's and counsel fees, to apply said proceeds to the payment of the amount due to your orator upon said contract, and said mechanic's lien, together with interest and costs. And your orator further prays that a receiver may be appointed according to the practice of this Court, with the usual powers of [15] receivers in like cases, of all property that is described in said mechanic's lien, and that the defendant Big Lost River Irrigation Company, and The American Trust and Savings Bank and Frank H. Jones, be decreed to make said transfer or conveyance to such receiver, and to the purchaser or purchasers of said property, at any sale as aforesaid as may be necessary and proper to put them, or either of them, in possession or control of said property. And your orator further prays that a decree of this Court be entered declaring whatever interest the defendants The American Trust and Savings

Bank, a corporation, and Frank H. Jones, may have in and to said property to be inferior and subsequent to plaintiff's claim.

And may it please your Honor to grant unto your orator a subpoena of the United States of America, issued out of and under the seal of this Honorable Court, directed to the defendants Big Lost River Irrigation Company, a corporation, The American Trust and Savings Bank, a corporation, and Frank H. Jones, therein and thereby commanding them, on a day certain therein to be named, and under a certain penalty, to be and appear before this Honorable Court, then and there to answer (but not under oath) all and singular the premises, and to stand, to perform and abide by the order, direction and decree as may be made against them in the premises as shall seem meet and agreeable to equity and good conscience.

And your orator will ever pray.

COREY BROS. CONSTRUCTION COMPANY,
By W. W. COREY, President,
Plaintiff.

H. H. HENDERSON,
Solicitor for Plaintiff, Postoffice Address, Ogden,
Utah, First National Bank Building. [16]

[Exhibit "A" to Bill of Complaint.]

State of Idaho,
Counties of Blaine, Bingham,
Custer and Fremont,—ss.

COREY BROS. CONSTRUCTION COMPANY,
a Corporation,

Claimant,

vs.

BIG LOST RIVER IRRIGATION COMPANY,
a Corporation,

Owner.

NOTICE OF INTENTION TO HOLD AND
CLAIM A LIEN.

TO WHOM IT MAY CONCERN:

NOTICE IS HEREBY GIVEN, that Corey Bros. Construction Company is now and was at all the times hereinafter set out, a corporation duly organized and existing under and by virtue of the laws of the State of Utah, with its principal place of business at Ogden, Utah; and at all the times hereinafter set out, said company was and now is doing business in its corporate name in the counties of Blaine, Bingham, Custer and Fremont, State of Idaho; and at all said times has accepted the provisions of the Constitution and complied with the laws of the State of Idaho relative to foreign corporations doing business within said state.

That the Big Lost River Irrigation Company is now and was at all the times hereinafter set out, a corporation organized and existing under and by virtue of the laws of the State of Idaho, and as such

has been and now is doing business in its corporate name in said State of Idaho.

That the claimant Corey Bros. Construction Company, holds and claims and hereby gives notice of lien for materials furnished [18] and labor done and performed, at the special instance and request of said Big Lost River Irrigation Company, in the construction of that certain reservoir and canal system, known as the Big Lost River Irrigation Company's system, in the counties of Blaine, Bingham, Custer and Fremont, State of Idaho.

That the said Big Lost River Irrigation Company is now and was at all the times herein set out, the owner of said irrigation system, together with all the appurtenances thereunto belonging, or in anywise appertaining, and including the reservoirs, laterals, dams, headgates, irrigation system, rights of way, lands, interest in lands, and rights hereinafter referred to and described more fully, and all situated in said counties of Blaine, Bingham, Custer and Fremont, State of Idaho.

That the said Big Lost River Irrigation Company caused said reservoirs, canals, ditches, laterals, dams, headgates, irrigation system and works to be constructed.

That on the 26th day of August, 1909, said Big Lost River Irrigation Company signed a contract in writing with the said Corey Bros. Construction Company, a corporation, claimant, for the furnishing of materials, and the construction of its said canal system, together with the clearing, bond-plowing, excavation of canal, drain ditches, excavating water-

ways or waste ditches, building dams, reservoirs, rip-rap, and pumping of water, which contract is in words and figures as follows:

THIS AGREEMENT, made and entered into this 26th day of August, 1909, by and between COREY BROTHERS CONSTRUCTION COMPANY, hereinafter called the Contractor, having its principal place of business in the city of Ogden, State of Utah; and the BIG LOST RIVER IRRIGATION COMPANY, hereinafter called the Company, having its principal place of business in the city of Boise, State of Idaho, WITNESSETH:

THAT, WHEREAS, the Contractor has agreed to furnish all labor and appliances required, and to construct an earth dam, [19] diversion works, tunnel, canals, concrete structures, and all other work incidental to the completion, ready for operation, of the irrigation system of the Company all in accordance with plans and specifications prepared by the Engineer for said Company:

NOW, THEREFORE, in consideration of the covenants herein contained, the parties hereto agree each with the other, as follows:

1. Definition of Terms:

Wherever the term Contractor is used in this contract, it refers to and indicates Corey Brothers Construction Company.

Wherever the term Company is used in this contract, it refers to the Big Lost River Irrigation Company.

The term Engineer is used to designate the Consulting Engineer duly appointed and assigned by the

Company to have general charge of all work incidental to the construction of the Company's project ready for operation.

2. General.

The Contractor hereby covenants and agrees to provide all labor and all materials, not herein required to be furnished by the Company, necessary for the complete and substantial execution of everything described or reasonably implied in the following specifications, in strict accordance in all respects with the terms of this contract, and to the satisfaction and acceptance of the Engineer, including all transportation, apparatus and appliances of every kind requisite for the same.

The Contractor further covenants and agrees that the plans accompanying these specifications and referred to in these specifications are to be and are accepted as an essential part of this contract, the same as if written at length herein, it being distinctly understood that wherever the specifications conflict with this agreement, the terms of this agreement shall govern.

The several parts of this contract shall be taken together to explain each other, and to make the whole consistent. All [20] work that may be called for in the specifications and not drawn on plans, or drawn on plans and not called for in the specifications, is to be executed and furnished as if described in both these ways; and should any work or material which is not noted in the specifications and plans, but which is nevertheless necessary for the proper carrying out of the obvious intentions thereof and of this con-

tract, the same shall be deemed to be implied and required, and not to be an addition to or deviation from the work hereby contracted for, and the Contractor shall, without additional remuneration, perform all such work and furnish all such material as fully as if it were particularly delineated or described.

3. Subletting or Transferring of Contract:

The Contractor shall not sublet nor transfer this contract, or any part thereof, to any person, excepting for the delivery of material, without the consent and approval in writing of the Engineer, who shall be furnished with copies of contracts if he requires them. The Contractor shall give competent attention to the work, and shall also keep a thoroughly competent foreman constantly upon the work. No subcontract shall under any circumstances relieve the Contractor of his liability under this contract, should the subcontractor fail to perform the work undertaken by him.

4. Co-operation:

The Contractor shall co-operate with any other contractors that work on the premises, and arrange to carry on his work in such a manner that none of the other said contractors shall be unnecessarily hindered or delayed in the progress of their work.

5. Inspection:

The Supervising Engineer, or his duly authorized assistants, shall at all times have access to the work, which work is to be entirely under their control.

Any material or construction which does not fully accord [21] with the letter or the intent of these

specifications may be condemned by the Engineer or his representatives, and the Contractor shall immediately rectify or replace such defective work without expense to the Company.

6. Night and Day Work.

If so directed by the Engineer, the Contractor shall carry on the work day and night, in order to complete the same within the contract time, and no extra charge shall be made by the Contractor for such night work.

7. Time of Completion:

It is hereby expressly covenanted and agreed by the Contractor that all work pertaining to this contract shall be started within ten (10) days from the execution hereof, and carried forward to completion as rapidly as is consistent with the weather and other conditions, and completed before May 1st, 1910; provided that, if the Contractor is prevented from beginning or proceeding with said work at any time by reason of strikes, inevitable accident or casualty, the act of God, or for any cause over which the Contractor has no control, the time the Contractor shall be necessarily delayed by any of said causes shall be added to the time herein provided for the completion of said work.

8. Guaranties:

The Contractor agrees to defend any and all suits for alleged infringement of any process of construction or system furnished by him under the specifications, and further agrees to reimburse the Company for any and all expense resulting from litigation with reference thereto; provided, however, that nothing

in this paragraph contained shall require the Contractor to defend or to reimburse the Company for defending any suit resulting from or growing out of the use of any device specifically described in the specifications and required to be used or incorporated by the Contractor in said dam or other structures.
[22]

The Contractor further guarantees all workmanship and all material furnished by him to be first class in every particular, and agrees to replace free of cost to the Company any part or piece showing defects of such material or workmanship within a period of one year from completion of the entire work, unless otherwise specified. The Contractor further agrees not to use any material, whether furnished by him or otherwise, known to him to be inferior or defective.

9. Bond:

The Contractor agrees upon the execution and delivery of this contract, if the Company so directs, to execute and deliver to the Company a good and sufficient bond of indemnity in amount equal to the

.....
and as security for the faithful performance by him of all the covenants and agreements he undertakes in this contract. The security in such bond of indemnity shall be a properly recognized surety corporation, and such security shall be such as shall be accepted and approved by the Engineer. It is understood that the cost of such bond, if required by the Company, shall be paid by the Big Lost River Irrigation Company.

10. Compensation:

In consideration of the faithful performance by the Contractor of all and singular the covenants and agreements herein contained, the Company agrees to pay the Contractor the following prices for doing the work, to wit:

Earth and gravel, to construct dam, \$0.25 per cubic yard.

Tunnel excavation at dam, \$5.00 per cubic yard.

Tunnel excavation in canal, \$6.00 per cubic yard.

Riprap per square yard (not hand laid), \$1.00.

Concrete of all kinds and structures, \$12.00 per cubic yard. [23]

Driving piling, cost plus 10%.

Solid rock excavation, \$1.50 per cubic yard.

Loose rock excavation, .50 per cubic yard.

Earth excavation in canal, .16 per cubic yard.

Clearing sage brush, \$6.00 per acre.

Lumber, in place, \$40.00 per thousand.

Wet excavation below river level, cost plus 10%.

Wash gravel, or 90% pure gravel, .25 per cubic yard.

Pumping of all kinds, cost plus 10%.

Any extra work ordered by Engineer, cost plus 10%.

Riprap, hand laid, \$1.00 per sq. yard.

Plus 110% cost of laying.

All material furnished by contractor, except lumber, cost of haul plus 10% cost of material.

The same classification of materials shall hold as stated in specifications for Mackay Dam.

On canal construction, the length of free haul shall be 200 feet, measured from center of gravity of em-

bankment to center of gravity of excavation. An allowance of 1½ cts. per cu. yd. per 100 ft. overhaul shall be made.

For hauling cement from the nearest railroad station to the dam site, the contractor shall be allowed \$1.50 per ton; but all cement for canals shall be hauled by the contractor free.

Partial payments of ninety per cent. (90%) of the cost of the material furnished and work done (said payments to be based upon the contract prices covering the entire work) shall be made by the Company to the Contractor on or before the tenth day of each calendar month for all work done by the Contractor during the preceding calendar month; but said partial payments shall be made only on estimates by the Engineer of the amount of work done and material furnished and of the proper allowance hereunder for such work and material. Final payment of the balance of the contract prices shall be made by the Company to the Contractor within [24] sixty (60) days of the completion of the work and acceptance thereof by the Engineer, provided that first payment shall not become due until.....

11. Materials for Construction:

The following construction materials will be furnished by the Company:

All cement will be furnished f. o. b. cars at the nearest railroad station. The Contractor's price per cubic yard for placing concrete shall cover the unloading and storing of cement in a dry place until used, and shall include the proper care of and shipping back to the cement mill of all sacks, the freight

charges, however, being paid by the Company. Any loss of cement due to improper storage or carelessness on the part of the Contractor will be charged against the Contractor.

All steel reinforcement will be furnished f. o. b. cars at the nearest railroad station, and the price paid the contractor per pound for placing steel reinforcement will include the unloading from the cars and responsibility for the material until placed in the work.

All sheet piling, valves and structural steel, hereafter specified to be furnished the Contractor on items which are to be placed by force account will be furnished f. o. b. cars at the nearest railroad station, and the force account paid the Contractor for placing sheet piling shall include the unloading from the cars and responsibility for the material until placed in the work.

It shall be the duty of the Contractor to make requisition for materials furnished by the Company at such a date that the same can be furnished without delay to the work, and the Contractor shall hold the Company harmless for demurrage charges due to delay in unloading materials. [25]

12. Understanding of Plans and Specifications:

The Contractor hereby distinctly and expressly declares and acknowledges that, before the signing of this contract, he has carefully read the same and the whole thereof, together with and in connection with the set of plans and specifications herein referred to, and that he has made such examination of this contract and of such plans and specifications and such investigation of the work required to be done and of

the material required to be furnished as to enable him to thoroughly understand the intention of this contract and the requirements, covenants, agreements, stipulations and restrictions contained in this contract and in said plans and specifications, and distinctly agrees that he will not hereafter make any claim or demand upon the Company based upon or arising out of any alleged misunderstanding or misconception on his part of the said requirements, covenants, stipulations and restrictions.

13. Other Agreements:

It is understood that there are no written or verbal agreements outside of this contract.

IN WITNESS WHEREOF, the parties hereto have executed this instrument in duplicate the day and year first above written.

**COREY BROTHERS CONSTRUCTION
COMPANY.**

By W. W. COREY,
President.

Attest: R. D. ROBERTS,
Secretary.

**BIG LOST RIVER IRRIGATION COM-
PANY.**

By C. B. HURTT,
President. [26]

Attest: B. W. OPPENHEIM,
Secretary.

That the work and labor done and the materials furnished as aforesaid by the said Corey Bros. Construction Company, claimant, to the Big Lost River Irrigation Company, in the construction of its said

reservoirs, canals, ditches, dams, laterals, irrigation system, works and dykes is as follows:

Work Done on Canals to Date.

Force account and extra work cost plus

10%.....	\$ 38,490.47
Earth excavation 1,306,914.3 cu. yds. @	
16¢.....	209,106.28
Gravel excavation 542,531.2 cu. yds. @	
25¢.....	135,632.80
Loose rock excavation 147,940.3 cu. yds.	
@ 50¢.....	73,970.15
Solid rock excavation 239,414.9 cu. yds.	
@ 1.50.....	359,122.35
Clearing 938.82 acres 6.00.....	5,632.92
Concrete 3,282.09 cu. yds. @ 12.00.....	39,385.08
Concrete (reinforced) 3,445.49 cu. yds. @	
12.50.....	43,068.63
Riprap, hand laid, 11,192.13 sq. yds. @	
1.00.....	11,192.13
Bridging, 227,031.2 40.00 per thousand...	9,081.25
Tunnel excavation 1,146.8 cu. yds. @ 6.00.	6,880.80
Riprap, not hand laid, 476.2 sq. yds. @	
1.00.....	476.20

	\$932,039.06

Work Done on Mackay Reservoir Dam to Date.

Force account and extra work, cost plus

10%.....	17,130.65
Tunnel excavation portals, 24,162 cu. yds.	
50¢.....	12,081.00
Tunnel excavation portals, 2,304. cu. yds.	
1.50.....	3,456.00

Cut-off trench 1,544. cu. yds. @ 25¢.....	386.00
Core-wall excavation 390. cu. yds. @ 25¢..	97.50
Tunnel excavation 2,487.5 cu. yds. @ 5.00.	12,437.50
Earth embankment 479,908.0 cu. yds. @	
25¢.....	119,977.00
Loose rock embankment 9,000 cu. yds. @	
50¢.....	4,500.00
Concrete core-wall 2,080.2 cu. yds. @	
12.00.....	24,962.40
[27]	
Spillway excavation 5,855. cu. yds. @	
1.50.....	8,782.50
Concrete in tunnel and around outlet	
pipes 1755.2 cu. yds. @ 12.00.....	21,062.40
Concrete on face of Dam 763.8 cu. yds.	
12.50.....	9,547.50
Coffer Dam embankment 18,537. cu. yds.	
25¢.....	4,634.25
Spillway tunnel excavation 554.3 cu. yds.	
5.00.....	2,771.50

	\$241,826.20

For materials furnished on dam and
canals to date, consisting of cement,
timber, bolts, nails and hardware..... 41,149.78

Making a total for work done and mate-
rials furnished of..... \$1,215,015.04

Which said amount became due and owing, accord-
ing to the terms of said contract and agreement of
employment.

That the said materials furnished and labor done
and performed were reasonably worth, and accord-

ing to the terms and provisions of said contract and agreement amounted to said sum of \$1,215,015.04, and the said Big Lost River Irrigation Company promised and agreed to pay said amount therefor.

That the said Corey Bros. Construction Company was the original contractor and furnished all said work, labor and materials, at the special instance and request of the said Big Lost River Irrigation Company, and all such labor and materials were actually used in the construction of the system known as the Big Lost River Irrigation Company's system.

That the first work done and materials furnished by the Corey Bros. Construction Company was on the 15th day of June, 1909, and that the said last work done and materials furnished by the said Corey Bros. Construction Company on said canal system was on the 15th day of August, 1910.

That all the work done by the Corey Bros. Construction Company and materials furnished by said company from the 15th [28] day of June, 1909, up to the 26th day of August, 1909, was done at the special instance and request of the Big Lost River Irrigation Company, and under and pursuant to the terms of the contract, which bears date August 26th, 1909; August 26th, 1909, being the date on which said contract was signed between the said Corey Bros. Construction Company and the Big Lost River Irrigation Company; though said contract was not signed until August 26th, 1909, the same was in full force and effect from the 15th day of June, 1909, up to the signing of the same.

That the Big Lost River Irrigation Company has

failed, neglected and refused to make payments to the said Corey Bros. Construction Company of the payments due it, and have failed, neglected, and refused to make said payments from the 10th day of February, 1910, and on account of the neglect, refusal and failure of said Big Lost River Irrigation Company to make said payments as provided in said contract, said Corey Bros. Construction Company has been compelled to stop work, and to discontinue furnishing materials upon the irrigation system known as the Big Lost River Irrigation Company's system. That the failure to complete said canal system provided for in said contract, has been entirely due to the fault and negligence of the Big Lost River Irrigation Company in not performing its part of the contract.

That the said Big Lost River Irrigation Company had due notice of the performing of all work and labor, and the furnishing of all of said materials, and the same was done, performed and furnished in the construction of said canal system, according to the terms of said contract.

That on said amount so due and owing for work done and materials furnished as aforesaid, being the aggregate sum of \$1,215,015.04, the said Big Lost River Irrigation Company has paid to claimant the sum of \$689,398.09, and no more, and there [29] is now due and owing to the said Corey Bros. Construction Company, claimant, on account of said work and labor done and materials furnished the sum of \$525,-616.95, after deducting all just credits and off-sets, together with interest as hereinafter set out, and a

lien is claimed therefor upon said Big Lost River Irrigation Company's system, and all the ditches, reservoirs, dams, laterals, water rights, works, rights of way, loose rock and masonry work, iron and wood structures, head-gates, lands, interest in lands and rights and property of every nature and appurtenant thereunto appertaining. Said property being more particularly described as follows:

All of the following lands in Custer County, State of Idaho: The Northeast quarter of the Southeast quarter (N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$) of Section Three (3), Lot Three (3) of Section Four (4), the southeast quarter of the Northeast quarter (S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$) of Section Five (5), the Northwest quarter of the Northwest quarter (N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$) and the South half of the Northwest quarter (S. $\frac{1}{2}$ N. W. $\frac{1}{4}$) of Section Eleven (11), Township Seven (7) North, Range 23 East; the Southwest quarter (S. W. $\frac{1}{4}$) of Section Thirty-three (33), Township Eight (8) North, Range Twenty-three (23) East, Boise Meridian, in all 405.25 acres, more or less.

All the reservoirs, dams, canals, ditches, laterals, head-gates, coulees, draws, flumes, rights of way and of flowage, easements, permits, privileges and franchises for dams, reservoirs, canals, ditches, and laterals, and, in general, the entire irrigation works, project, and system in Blaine, Bingham, Custer and Fremont Counties, State of Idaho, commonly known as the Big Lost River Irrigation System, and any addition or extension thereto, now constructed by the Company, or which it may hereafter construct or acquire, together with all franchises and powers, privi-

leges and appurtenances connected therewith. [30]

All the right to divert and use the waters of the Big Lost River and Antelope Creek in the State of Idaho, and all other rights under the following permits:

Permit No. 1507, to appropriate the waters of Big Lost River and its tributaries to an amount equivalent to a continuous flow of one thousand (1,000) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho in Book 5 of Permits, at page 1507;

Permit No. 1513, to appropriate the waters of Antelope Creek to an amount equivalent to a continuous flow of one hundred (100) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 5 of Permits, at page 1513;

Permit No. 1748, to appropriate the waters of Big Lost River and its tributaries to an amount equivalent to a continuous flow of two hundred (200) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 6 of Permits, at page 1748;

Permit No. 4061, being an amendment to Permit No. 1507, to appropriate the waters of the Big Lost River and its tributaries, as the same is of record in the office of the State Engineer of the State of Idaho, in Book 11 of Permits, at page 4061;

Permit No. 4062, being an amendment of Permit No. 1513, to appropriate the waters of Antelope Creek, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 11 of Permits, at page 4062;

Permit No. 4063, being an amendment to Permit No. 1748, to appropriate the waters of the Big Lost River and its tributaries, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 11 of Permits, at page 4063;

Permit No. 4946, to appropriate the waters of Big Lost River [31] and its tributaries to an amount equivalent to a continuous flow of one thousand (1,000) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 14 of Permits, at page 4946;

Permit No. 4960, to appropriate the waters of Antelope Creek to an amount equivalent to a continuous flow of five hundred (500) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 14 of Permits, at page 4960.

That certain right of way for the Big Lost River Reservoir, situated in Townships 7 and 8, North, Range 23 East, Boise Meridian, Custer County, State of Idaho, approved by the Acting Secretary of the Interior, August 2nd, 1906, for a more particular description of which reservoir reference is hereby made to the map and field-notes thereof filed in the United States Land Office at Hailey, Idaho, on the first day of August, 1905, and to the field-notes of the survey thereof, with witness points and witness corners of Townships 7 and 8 North, Range 23 East, Boise Meridian, filed in said office July 13th, 1908; and to the amended map and amended field-notes showing the definite location of said reservoir, filed in the United States Land Office, at Hailey, Idaho, on the 18th day of June, 1909.

That certain right of way for the Big Lost River Canals, situated in Townships 3, 4, 5 and 6 North, Ranges 25, 26 and 27 East, Boise Meridian, in Blaine and Custer Counties, State of Idaho, approved by the Acting Secretary of the Interior August 2nd, 1906, for a more particular description of which right of was reference is hereby made to the map and field-notes thereof, filed in the United States Land Office at Hailey, Idaho, on the first day of August, 1905.

That certain right of way for the Lower Big Lost River Reservoir in Sections 21 and 28, Township 3 North, Range 27 [32] East, Boise Meridian, approved by the Secretary of the Interior on April 27, 1906, for a more particular description of which reservoir reference is hereby made to the map and field-notes thereof, filed in the United States Land Office at Hailey, Idaho.

That certain right of way for the Lower Big Lost River Canals, situated in Township 3 North, Range 27 East, Boise Meridian, in Blaine County, State of Idaho, approved by the Commissioner of the General Land Office by letter F, dated April 26th, 1906, for a more particular description of which right of was reference is hereby made to the map and field-notes thereof, filed in the United States Land Office at Hailey, Idaho.

That certain right of way for the Antelope Reservoir situated in Township 4 North, Range 24 East, Boise Meridian, in Blaine and Custer Counties, State of Idaho, application for which was filed in the United States Land Office, Hailey, Idaho, on June 18th, 1909, for a more particular description of which

reservoir reference is hereby made to the map and field-notes thereof filed in said land office on said day.

All the rights, grants, interests, privileges, easements and franchises acquired by the Company under or in that certain contract dated May 27th, 1909, made by and between the State of Idaho, through its State Board of Land Commissioners, and George S. Speer, and by said George S. Speer transferred and assigned to the Company, for the construction of an irrigation system and works for the reclamation under the provisions of the Carey Act of approximately one hundred thousand (100,000) acres of land in the Big Lost River Valley in the Counties of Custer, Blaine, Bingham and Fremont in the State of Idaho; as well as under any similar contract that may be made between the State of Idaho and the Company, and any amendment to the above mentioned present contract, for the construction of irrigation [33] works and system in Idaho under the Carey Act, constituting extensions or additions to its said present system.

All the contracts heretofore made by the Company, or its predecessors in interest, or which may be hereafter entered into by the Company with settlers for the sale of water rights for water to be taken from or through said irrigation system, as the same is now or may be hereafter constituted, and all mortgages, constituting, to the extent of the unpaid portion of the purchase price of such water rights, first liens on the lands irrigated thereunder.

All right, title and interest in and to said Idaho State Desert Land List No. 31, and the proposition

made by said George S. Speer under the name of G. S. Speer to the State Board of Land Commissioners for the irrigation of the lands mentioned in said list.

WHEREFORE, Corey Bros. Construction Company, a corporation, claimant, hereby claims and gives notice that it holds and claims a lien upon the Big Lost River Irrigation Company's canal system, and upon all appurtenances thereunto appertaining, as hereinbefore enumerated, and upon the whole thereof, for the said sum of \$525,616.95, together with legal rate of interest thereon from the 15th day of August, 1910, and also legal interest on \$20,687.30 from February 10th, 1910, to August 15th, 1910, and on \$10,004.95 from March 10th, 1910, to August 15th, 1910, and legal interest on \$62,047.77 from April 10th, 1910, to August 15, 1910, and legal interest on \$117,212.65 from May 10th, to August 15, 1910, and legal interest on \$118,855.30 from June 10th, 1910, to August 15th, 1910, and legal interest on \$93,042.91 from July 10th, 1910, to August 15th, 1910, under and by virtue of the provisions of the Statutes of Idaho relating to liens and preferred claims of mechanics and others in such cases made and provided. [34]

Dated this 19th day of August, 1910.

COREY BROS. CONSTRUCTION COMPANY,

By W. W. COREY,

President and General Manager.

[Seal] Attest: A. T. COREY,

Secretary.

State of Utah,
County of Weber,—ss.

Warren W. Corey, being first duly sworn, deposes and says: That he is President and General Manager of the Corey Bros. Construction Company, a corporation, original contractor herein, claimant in the foregoing notice of lien, and as such is authorized to make and verify this lien; that he has read the above and foregoing claim and notice of lien, and knows the contents thereof, and the same is true and just, and the statements therein contained of the demand and claim of said Corey Bros. Construction Company against the Big Lost River Irrigation Company for work and labor performed and materials furnished upon and in the construction of said canal system are correct, and the work and labor has been done and performed, and materials furnished as therein stated, and there is now due and owing to the said Corey Bros. Construction Company from the said Big Lost River Irrigation Company for said work performed and materials furnished, the sum of \$525,616.95, and interest as above set out, after deducting all just credits and off-sets.

W. W. COREY.

Subscribed and sworn to before me this 19th day of August, 1910.

My commission expires Dec. 9th, 1910.

[Seal]

JOHN C. DAVIS,

Notary Public.

[Endorsed]: Filed Oct. 15, 1910. A. L. Richardson, Clerk. [35]

[Title of Court and Cause.]

The Separate Answer of the Big Lost River Irrigation Company, a Corporation, to the Above-entitled Bill of Complaint.

I.

Now comes the Big Lost River Irrigation Company, a corporation, and saving and reserving to itself all manner of benefit and advantage of exception to the numerous errors, uncertainties and insufficiencies in the said bill of complaint contained with like effect as if this defendant had demurred thereto, for answer to the said bill of complaint, or to such parts thereof as this defendant is advised it is necessary or material for it to make answer unto, answering says:

II.

1. This defendant is not advised, save by the allegations of the said bill of complaint, whether or not the complainant is a corporation organized under the laws of the State of Utah or whether it is a resident or citizen of the State of Utah and prays that the said complainant may be required to make strict proof of its allegations in that behalf. [36]

2. Further answering, this defendant says that it is not advised, save by the allegations of said bill, as to whether the complainant in said bill has complied with the provisions of the Constitution and laws of the State of Idaho relative to foreign corporations, nor is this defendant advised as to whether or not the complainant was, at the time of the filing of the bill of complaint, or at the time of the doing of the

alleged work in said bill of complaint described, authorized to carry on business or maintain suits within the State of Idaho or in this court and the defendant prays that the complainant may be required to make strict proof of its allegations in that regard.

3. Further answering, this defendant says that it is not advised, save by the allegations of said bill, as to what work, if any, has been done by the complainant on account of the construction of the, or any, dam or canals for this defendant nor as to what was the contract price or cash value of such work, if any, so performed by complainant and this defendant prays that said complainant may be required to make strict proof of the allegations of its bill in that behalf.

4. Further answering, this defendant says that it is advised and believes and therefore alleges the fact to be that any contract in writing entered into between the complainant and this defendant was valid and binding only from the date of its execution and delivery.

5. Further answering, this defendant denies that the failure to complete the canal system provided for in the contract referred to in the bill of complaint has been due to the fault or negligence of this defendant in not performing its part of the contract, as set out in said complaint, and in not furnishing material or on account of any failure of the engineer in charge to make surveys and cross-sections of said work. [37]

6. Further answering, this defendant denies that

plaintiff has done work and furnished materials, or has done work or furnished materials, under the contract referred to in the bill of complaint, in the aggregate sum of One Million Two Hundred Fifteen Thousand Fifteen Dollars Four Cents (\$1,215,015.04) and denies that the sum of Five Hundred Twenty-five Thousand Six Hundred Sixteen Dollars Ninety-five Cents (\$525,616.95), together with interest thereon, is now due and owing by this defendant to plaintiff on account of work and labor done and materials furnished, as alleged in said complaint.

7. Further answering, this defendant says that it is not advised, save by the allegations of the said bill of complaint, as to whether or not the said complainant has filed for record any notices whatsoever of intention to claim a lien in any county in the State of Idaho, or as to what are the contents of any purported notices of lien claimed to have been so filed, nor is this defendant advised, save by the allegations of said bill, as to whether or not the, or any, purported copy of said, or any, notice attached to the said bill of complaint is in fact a true copy of any notice actually filed, as alleged in said bill of complaint, and this defendant prays that the complainant may be required to make strict proof of the allegations of its bill of complaint in that regard.

8. Further answering, this defendant denies that plaintiff has a mechanic's or contractor's lien upon all or any contracts heretofore made by this defendant company, or its predecessor in interest, or upon any contracts which it may hereafter enter into with settlers, for the sale of water rights or water to be

taken from or through the irrigation system described in the said complaint, as the same is now or may be hereafter constructed, and denied that plaintiff has, or is entitled to, a lien upon any mortgages constituting, to the extent of the unpaid [38] portion of the purchase price of such water rights, first liens on the land irrigated thereunder; but this defendant avers that all such contracts and mortgages have been, and were, by this defendant company, at various times during the progress of the work and the furnishing of materials referred to in the bill of complaint, assigned for value and delivered to The American Trust and Savings Bank and Frank H. Jones, trustees, as additional and collateral security for the payment of certain bonds issued by this defendant company for the purpose of procuring the money wherewith to construct said irrigation system and that the moneys admitted by said plaintiff to have been received by it from this defendant company on account of such work, labor and materials were, to a large extent, the proceeds of the sales of bonds of this company secured in part by the transfer, assignment and delivery to said trustees of the contracts and mortgages referred to and the said contracts and mortgages are now held and owned by the said trustee for the purpose for which the same were so transferred, assigned and delivered.

9. Further answering, denies that plaintiff has fully kept and performed its part of the agreement and contract referred to in the bill of complaint or has fully performed the labor and furnished the ma-

terials required by it.

10. Further answering, this defendant denies that the sum of Forty Thousand (\$40,000) Dollars is a reasonable attorneys' fee to be allowed to plaintiff in this action.

11. Further answering, this defendant denies that the dam at Mackay, Idaho, constituting a part of the irrigation system of this defendant, was, at the time of the filing of the bill of complaint, or is now, in such condition that more money should be, or is required to be, spent upon it in order to protect the work that has already been done thereon. [39]

As to each of the allegations of the bill of complaint herein not in this answer expressly admitted or denied, this defendant prays that the complainant may be required to make strict proof of each of such allegations of said bill of complaint as against this defendant.

WHEREFORE, this defendant prays to be hence dismissed with its costs and charges in this behalf wrongfully sustained.

BIG LOST RIVER IRRIGATION COMPANY,

By C. B. HURTT,
President.

N. M. RUICK,

Attorney for Defendant, Big Lost River
Irrigation Company. [40]

[Endorsed]: Filed Feb. 6, 1911. [41]

[Title of Court and Cause.]

**Answer of Continental and Commercial Trust &
Savings Bank and Frank H. Jones.**

**THE JOINT AND SEVERAL ANSWER OF
THE CONTINENTAL AND COMMERCIAL
TRUST & SAVINGS BANK, FORMERLY
THE AMERICAN TRUST AND SAVINGS
BANK, A CORPORATION, AND FRANK H.
JONES, DEFENDANTS, TO THE ABOVE-
ENTITLED BILL OF COMPLAINT.**

Now come the Continental and Commercial Trust & Savings Bank, formerly The American Trust and Savings Bank, and Frank H. Jones, and saving and reserving to themselves all manner of benefit and advantage of exception to the numerous errors, uncertainties and insufficiencies, in the said bill of complaint contained, with like effect as if these defendants had severally demurred thereto, for answer to the said bill of complaint, or to such parts thereof as these defendants are advised it is necessary or material for them to make answer unto, answering say:

1. These defendants are not advised, save by the allegations of the said bill of complaint, whether or not the [42] complainant is a corporation, organized under the laws of Utah, or whether it is a resident or citizen of the State of Utah, and pray that the said complainant may be required to make strict proof of its allegations in that behalf; but these defendants admit that the defendant The Continental and Commercial Trust & Savings Bank, under its former name of The American Trust & Savings

Bank, was at the time of the filing of the bill of complaint herein, and still is, a citizen and resident of the State of Illinois, and that the defendant Frank H. Jones is also a citizen and resident of the State of Illinois.

2. Further answering, these defendants say that they are not advised, save by the allegations of said bill, as to whether the complainant in said bill has complied with the provisions of the Constitution and laws of the State of Idaho relative to foreign corporations, nor are these defendants advised as to whether or not the complainant was at the time of the filing of the bill of complaint, or at the time of the doing of the alleged work in said bill of complaint described, authorized to carry on business or maintain suits within the State of Idaho, or in this court, and the defendants pray that the complainant may be required to make strict proof of its allegations in that regard.

3. Further answering, these defendants say that they are not informed save by the allegations of the bill of complaint herein as to whether or not the defendant, Big Lost River Irrigation Company, entered into any contract with the said complainant upon the 26th day of August, 1909, or at [43] any other time, nor are these defendants advised as to the terms of any such alleged contract nor whether any such supposed contract purporting to be the contract of the Big Lost River Irrigation Company was in fact the valid and properly executed and binding contract of said Big Lost River Irrigation Company, nor as to the terms of payment, or the price to

be paid for any work alleged to be done under any such contract, and these defendants pray that the said complainant may be required to make strict proof of each of the allegations of its bill of complaint in that behalf as against these defendants.

4. Further answering, these defendants say that they are not advised save by the allegations of said bill, as to what work, if any, has been done by the complainant upon account of the construction of any dam or canals for the Big Lost River Irrigation Company, nor as to what was the contract price or cash value of such work, if any, as has been done by said complainant; and these defendants pray that the said complainant may be required to make strict proof of each of the allegations of its bill of complaint in that behalf.

5. Further answering, these defendants say that they are advised and believe, and therefore allege the fact to be that any contract in writing entered into between the complainant and the said Big Lost River Irrigation Company was valid and binding only from the date of its execution and delivery.

6. Further answering, these defendants say that they are not advised save by the allegations of said bill of complaint as to what defaults, if any, have been [44] made by the Big Lost River Irrigation Company in any dealings between the complainant and said company, nor as to what sums, if any, are due from the Big Lost River Irrigation Company to the said complainant; and these defendants pray that the complainant may be required to make strict proof of the allegations of its bill of complaint in that regard.

7. Further answering, these defendants say that they are not advised, save by the allegations of the said bill of complaint, as to whether or not the said complainant has filed for record any notices whatsoever in any county in the State of Idaho, or as to what are the contents of any purported notices claimed to have been so filed in any county in said State, nor are these defendants advised, save by the allegations of said bill, as to whether or not any purported copy of any notice attached to the said bill of complaint, is in fact a true copy of any notice actually filed, and these defendants pray that the complainant may be required to make strict proof of the allegations of its bill of complaint in that regard.

8. Further answering, these defendants say that it is true that under and by virtue of a certain deed of trust, dated the 1st day of July, A. D. 1909, and duly executed by the Big Lost River Irrigation Company, by its proper officers thereunto duly authorized, and attested by its corporate seal, the said Big Lost River Irrigation Company, which was then the **true and lawful owner of the property** in said deed of trust described and duly authorized to convey the same as therein set forth, did grant, bargain, sell and convey to these defendants, [45] in trust, all and singular the following described property, that is to say:

(1) All the following lands in Custer County, State of Idaho: The Northeast Quarter of the Southeast Quarter (N.E. $\frac{1}{4}$, S.E. $\frac{1}{4}$) of Section Three (3) Lot Three (3) of Section Four (4), the Southeast Quarter of the Northeast Quarter (S.E. $\frac{1}{4}$, N.E.

$\frac{1}{4}$) of Section Five (5), the Northwest Quarter of the Northwest Quarter (N.W. $\frac{1}{4}$, N. W. $\frac{1}{4}$) and the South Half of the Northwest Quarter (S. $\frac{1}{2}$, N.W. $\frac{1}{4}$) of Section Eleven (11), Township Seven (7) North, Range 23 East; the Southwest Quarter (S.W. $\frac{1}{4}$) of Section Thirty-three (33), Township Eight (8) North, Range Twenty-three (23) East, Boise Meridian, in all 405.25 acres, more or less.

The foregoing lands lie in the bed of the proposed reservoir of the company and are owned by it in fee, which lands upon the construction of the company's impounding dam will be flooded, and will then become and thereafter be lands under water, forming an integral part of said irrigation system, said lands being hereby conveyed and mortgaged subject to the right of the company to proceed with the completion of its irrigation system and works.

(2) All the reservoirs, dams, canals, ditches, laterals, head-gates, coulees, draws, flumes, rights of way and of flowage, easements, permits, privileges and franchises for dams, reservoirs, canals, ditches, and laterals, and, in general, the entire irrigation works, project and system in Blaine, Bingham, Custer and Fremont Counties, State of Idaho, commonly known as the Big Lost River Irrigation system, and any addition or extension thereto, now constructed by the company, or which it may hereafter construct or acquire, together with all franchises and powers, privileges and appurtenances connected therewith.

(3) All the right to divert and use the waters of the Big Lost River and Antelope Creek in the State

of Idaho and all other rights under the following permits:

Permit No. 1507, to appropriate the waters of Big Lost River and its tributaries to an amount equivalent to a continuous flow of one thousand (1000) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho in Book 5 of Permits, at Page 1507;

Permit No. 1513, to appropriate the waters of Antelope Creek to an amount equivalent to a continuous flow of one hundred (100) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 5 of Permits, at Page 1513; [46]

Permit No. 1748, to appropriate the waters of Big Lost River, and its tributaries, to an amount equivalent to a continuous flow of two hundred (200) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho in Book 6 of Permits, at Page 1748;

Permit No. 4061, being an amendment to Permit No. 1507, to appropriate the waters of the Big Lost River and its tributaries, as the same is of record in the office of the State Engineer of the State of Idaho in Book 11 of Permits, at Page 4061;

Permit No. 4062, being an amendment of Permit No. 1513, to appropriate the waters of Antelope Creek, as the same appears of record in the office of the State Engineer of the State of Idaho in Book 11 of Permits, at Page 4062;

Permit No. 4063, being an amendment to Permit No. 1748, to appropriate the waters of the Big Lost

River and its tributaries, as the same appears of record in the office of the State Engineer of the State of Idaho in Book 11 of Permits at Page 4063;

Permit No. 4946, to appropriate the waters of Big Lost River and its tributaries to an amount equivalent to a continuous flow of one thousand (1000) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 14 of Permits, at Page 4946;

Permit No. 4960, to appropriate the waters of Antelope Creek to an amount equivalent to a continuous flow of five hundred (500) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 14 of Permits, at Page 4960;

(4) That certain right of way for the Big Lost River reservoir, situated in Townships 7 and 8 North, Range 23 East, Boise Meridian, Custer County, State of Idaho, approved by the Acting Secretary of the Interior, August 2d, 1906, for a more particular description of which reservoir reference is hereby made to the map and field-notes thereof filed in the United States Land Office at Hailey, Idaho, on the first day of August, 1905, and to the field-notes of a survey thereof, with witness points and witness corners of Townships 7 and 8 North, Range 23 East, Boise Meridian, filed in said office July 13th, 1908; and to the amended map and amended field-notes showing the definite location of said reservoir filed in the United States Land Office at Hailey, Idaho, on the 18th day of June, 1909.

(5) That certain right of way for the Big Lost River canals, situated in Townships 3, 4, 5 and 6 North, Ranges 25, 26 and 27 East, Boise Meridian, in Blaine and Custer Counties, State of Idaho, approved by the Acting Secretary of the Interior, August 2d, 1906, for a more particular description of which right of way reference is hereby made to the map and field-notes thereof, filed in the United States Land Office at Hailey, Idaho, on the first day of August, 1905.

(6) That certain right of way for the lower Big Lost River reservoir in Sections 21 and 28, Township 3 North, Range 27 East, Boise Meridian, approved by the Secretary of the Interior on April 27, 1906, for a more particular description of which reservoir reference is hereby made to the map and field-notes thereof, filed in the United States Land Office, at Hailey, Idaho.

(7) That certain right of way for the lower Big Lost River canals, situated in Township 3 North, Range 27 East, Boise Meridian, in Blaine County, State of Idaho, approved by the Commissioner of the General Land Office by letter F, dated April 20th, 1906, for a more particular description of which right of way reference is hereby made to the map and field-notes thereof, filed in the United States Land Office, at Hailey, Idaho.

(8) That certain right of way for the Antelope reservoir, situated in Township 4 North, Range 24 East, Boise Meridian, in Blaine and Custer Counties, State of Idaho, application for which was filed in the United States Land Office, Hailey, Idaho, on June

18th, 1909, for a more particular description of which reservoir reference is hereby made to the map and field-notes hereof, filed in said land office on said day.

(9) All the rights, grants, interests, privileges, easements and franchises acquired by the company under or in that certain contract, dated May 27th, 1909, made by and between the State of Idaho, through its State Board of Land Commissioners, and George S. Speer, and by said George S. Speer transferred and assigned to the company, for the construction of an irrigation system and works for the reclamation under the provisions of the Carey Act of approximately one hundred thousand (100,000) acres of land in the Big Lost River valley in the counties of Custer, Blaine, Bingham and Fremont, in the State of Idaho; as well as under any similar contract that may be made between the State of Idaho and the company, and any amendment to the above-mentioned present contract, for the construction of irrigation works and systems in Idaho under the Carey Act, constituting extensions or additions to its said present system. [48]

(10) All the contracts heretofore made by the company, or its predecessors in interest, or which may be hereafter entered into by the company with settlers for the sale of water rights for water to be taken from or through said irrigation system, as the same is now or may be hereafter constituted, and all mortgages, constituting, to the extent of the unpaid portion of the purchase price of such water rights, first liens on the lands irrigated thereunder, which

may be deposited with the trustee hereunder, in accordance with the provisions hereof.

(11) All right, title and interest in and to said Idaho State Desert Land List, No. 31, and the proposition made by said George S. Speer, under the name of G. S. Speer to the State Board of Land Commissioners for the irrigation of the lands mentioned in said list.

And these defendants say that the said deed of trust was duly executed and acknowledged by the said Big Lost River Irrigation Company and by these defendants, and was duly approved by the Attorney General of the State of Idaho, on the 27th day of August, A. D. 1909, and was duly recorded in the Recorder's office in the County of Blaine, in the State of Idaho, on the 3d day of September, 1909, and was also recorded in the Recorder's Office of the County of Bingham on the 3d day of September, 1909, and was also duly recorded in the Recorder's office of the County of Fremont, in the State of Idaho, on the 4th day of September, 1909, and was also duly recorded in the Recorder's office of the County of Custer, and State of Idaho on the 8th day of September, 1909, and from the said date of said deed and the respective records thereof, has been and still is a valid and subsisting first lien upon the property therein described, as these defendants are informed and believe, and therefore state the fact to be. And these defendants pray leave to refer to the original of said mortgage or deed of trust and the record thereof, as [49] the same is spread of record in the Recorder's Office of said respective coun-

ties, in the State of Idaho, with like effect as if these defendants had set forth the said deed of trust and each of the provisions thereof, according to its and their legal effect in this answer.

9. These defendants further show that in and by the said deed of trust it was, among other things, provided in addition to the said conveyance of the said property hereinbefore described, that the said Big Lost River Irrigation Company should assign to and deposit with these defendants as trustees, as additional security for the payment of bonds of the par value of Two Million Dollars (\$2,000,000.00) in said trust deed authorized to be issued, all contracts for the purchase of water rights for the irrigation of portions of the land described in Idaho State Desert Land Lists, numbered 8, 18, and 31, which contracts were and are known as settlers' contracts, and these defendants aver that in fact there have been issued and certified by these defendants, and are now outstanding, bonds of the par value of One Million Three Hundred Seventy-eight Thousand Five Hundred Dollars (\$1,378,500.00), all of which, together with interest due and accrued thereon, now remain wholly outstanding and unpaid, and these defendants state that there have been duly assigned and deposited with these defendants all of the said settlers' contracts, as these defendants are informed and believe, and therefore allege, which have been issued or executed by said Big Lost River Irrigation Company, and these defendants are informed and believe, and therefore state the fact to be, that the said deed of trust or mortgage [50] and the said

bonds are a valid and subsisting first lien, not only upon the property in said deed of trust and herein-before described, but upon the said settlers' contracts, and each thereof, and that the lien of the said mortgage or deed of trust and of the said bonds secured thereby is, as these defendants are informed and believe and therefore allege the fact to be, prior to any claim or demand on the part of the said complainant herein; and these defendants upon information and belief, deny that the claim of these defendants, as trustees, and the interest created by said deed of trust, is in any way subsequent, inferior or subject to the lien and claim of the complainant herein.

10. Further answering, these defendants say that afterwards and on or about the 1st day of January, A. D. 1910, the said Big Lost River Irrigation Company duly executed to these defendants (the defendant, The Continental and Commercial Trust & Savings Bank being then named and called The American Trust & Savings Bank), its certain mortgage, denominated a collateral trust mortgage, to secure its collateral trust bonds, for the aggregate sum of Four Hundred Thousand Dollars (\$400,000.00), with interest evidenced by coupons thereto attached, at the rate of six (6) per cent per annum, which said collateral trust mortgage was duly recorded in the Recorder's Office of the County of Blaine, on the 28th day of March, 1910, and duly recorded in the Recorder's Office of the County of Bingham on the 28th day of March, 1910, and duly recorded in the Recorder's Office of the County of Custer, on the 1st day of April, 1910, and [51] duly recorded in the

Recorder's Office of the County of Fremont, on the 8th day of April, 1910; in and by which said collateral trust mortgage the said Big Lost River Irrigation Company assigned, transferred and conveyed to these defendants all and singular the same property theretofore conveyed to these defendants under said deed of trust hereinbefore described, but in said collateral trust mortgage it was especially provided and set forth that the conveyance therein made and the security thereby given for the said Four Hundred Thousand Dollars (\$400,000.00) of collateral trust bonds was and should be subject to the prior accruing indebtedness of the said deed of trust, dated July 1st, 1909, and hereinbefore described; and these defendants say that subject to the security and lien of the said deed of trust of July 1st, 1909, as hereinbefore described, and subject to the lien thereby created, the said Big Lost River Irrigation Company by its said collateral trust mortgage, conveyed all and singular the said property upon substantially the same terms and conditions as in said deed of trust of July 1st, 1909, as hereinbefore set forth, contained, and these defendants say that under said collateral trust mortgage there were issued and are now outstanding, collateral trust bonds of the par value of Two Hundred Thousand Dollars (\$200,000.00), together with coupons now overdue and unpaid thereon, evidencing the interest thereon, which said collateral trust mortgage and the bonds secured thereby are, as these defendants are informed and believe, and therefore allege the fact to be, a lien upon all the property in said mortgage described

and upon said settlers' contracts, subsequent only to the lien of the said [52] deed of trust of July 1st, 1909, and are prior to any claim or demand on the part of said complainant herein, and these defendants, upon information and belief, deny that the claim of these defendants, as trustees, under said collateral trust mortgage and the interest created by said collateral trust mortgage is in any way subsequent, inferior, or subject to the lien and claim of the complainant herein.

11. Further answering, these defendants say that they are not advised, save by the allegations of said bill, as to whether or not the property in said bill of complaint described is separable or can be sold in parcels or lots, and in so far as the complainant may be advised that such allegation is necessary or material, these defendants pray that the complainant may be required to make strict proof thereof.

12. Further answering, these defendants say that they are not informed, save by the allegations of said bill of complaint, as to what, if any, attorneys' fees were incurred by the said complainant, nor as to what would be a reasonable and proper fee for the said complainant's attorneys; wherefore these defendants neither admit nor deny the allegation of the said bill of complaint in that respect, but these defendants deny that any such solicitors' fee is a lien upon said premises, as against the lien of the said bonds and deed of trust and collateral trust mortgage hereinbefore described.

13. Further answering, these defendants neither admit nor deny the allegations of the said bill of the

complaint, as to any alleged interest therein claimed to be due [53] from the Big Lost River Irrigation Company to the complainant therein, and pray that the complainant be required to make strict proof thereof.

14. Further answering, these defendants say that they are not informed save by the allegations of the said bill of complaint as to the condition of the said dam therein described, nor as to whether or not additional work is required to be done upon said dam in order to protect the same; nor as to whether or not the said Big Lost River Irrigation Company is insolvent, nor as to whether or not the complainant has commenced any other proceeding at law or in equity to collect any alleged indebtedness claimed to be owing to it; wherefore these defendants neither admit nor deny the allegations of the bill of complaint in that regard, but pray that the complainant may be required to make strict proof of each of said allegations.

15. Further answering, these defendants say that they are informed and believe, and therefore allege the fact to be, that under the laws of the State of Idaho, and under the laws of the United States of America, the said complainant is not entitled to any mechanic's lien upon the said property in said bill of complaint described, as against the said settler's contracts hereinbefore referred to, or as against the bonds and deed of trust and collateral trust mortgage hereinbefore described, and these defendants pray the same advantage of this claim of defense as if these defendants had demurred to the said bill of complaint upon that ground.

16. Further answering, these defendants say that they are informed and believe, and therefore state the fact [54] to be that the proceeds of these said bonds so issued and outstanding and secured by the said deed of trust as hereinbefore set forth, and by the assignment of the said settlers' contracts, were used in and about the work of constructing said irrigation works and dam, and that large amounts of the proceeds of said bonds have been paid to the complainant herein, and that, as to so much of the proceeds of said bonds as have been so applied to the payment of the cost of constructing said dam and irrigation works, and as to so much of the proceeds of said bonds as have been applied to the payment of the said complainant for work done by it upon said irrigation works and dam, these defendants, as trustees for said bondholders, are entitled in equity and good conscience to a lien upon all of said property, at least co-ordinate with any lien claimed by the said complainant, apart from the rights arising under the execution and record of said deed of trust hereinbefore referred to, and arising from the assignment and deposit of the settlers' contracts aforesaid.

17. Further answering, these defendants say that under and by virtue of the terms of the said deed of trust and collateral trust mortgage, these defendants, upon any default on the part of the said Big Lost River Irrigation Company are entitled to the possession and control of all the property in said deed of trust and collateral trust mortgage described, and these defendants allege that under the said provisions of said deed of trust and collateral trust mortgage, these defendants are entitled to the possession and

control of all the property in said bill of complaint described, as against the said complainant therein, or as [55] against any person appointed as receiver under the said bill of complaint herein, and these defendants pray that their rights in that regard may be protected in any order which may be entered herein, pending the further hearing of this suit upon the prayer of the bill of complaint herein, for the appointment of a receiver, or otherwise.

As to each of the allegations of the bill of complaint herein, not in this answer expressly admitted or denied, these defendants pray that the complainant may be required to make strict proof of each of such allegations of said bill of complaint as against these defendants.

WHEREFORE, having fully answered the bill of complaint filed herein, these defendants pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

CONTINENTAL AND COMMERCIAL
TRUST & SAVINGS BANK,
Formerly THE AMERICAN TRUST AND
SAVINGS BANK,

By JOHN J. ABBOTT,
Vice-President.

[Seal] Attest: FRANK H. JONES,
Secretary.

FRANK H. JONES.

MAYER, MEYER, AUSTRIAN & PLATT,
N. M. RUICK,

Solicitors, and of Counsel. [56]

[Endorsed]: Filed February 6, 1911. [57]

[Title of Court and Cause.]

Amendments to Answer.

And now come the Continental and Commercial Trust and Savings Bank (formerly The American Trust and Savings Bank) and Frank H. Jones, defendants in the above cause, and move the Court for leave to file the following amendments to the answer filed in this cause on the 6th day of February, A. D. 1911, to wit: Add at the close of paragraph 17 of said answer the following paragraphs:

18. Further answering, these defendants say they are informed and believe and so allege the fact to be that the said plaintiff wholly failed to do and perform the construction work referred to in the amended bill of complaint, and for which the said plaintiff seeks to foreclose its alleged lien, in the form [58] or manner or at the time required by the contract between the said plaintiff and the said Big Lost River Irrigation Company, or in accordance with the terms thereof or the specifications therein contained or therein referred to. And by reason of the default, failure and neglect of the said plaintiff to do and perform such work, or carry out its said contract in the manner, at the time, and in accordance with the terms of said contract, the said defendant, Big Lost River Irrigation Company, suffered great loss, damage and injury; and by reason of the said failure, negligence, and default of said plaintiff, the State Board of Land Commissioners of the State of Idaho, and the State Engineer of the State of Idaho ordered and directed the said Big Lost River Irrigation

Company to discontinue work on said Mackay dam, and said irrigation system cannot be utilized or turned to account without the completion of said dam. And the said Big Lost River Irrigation Company was thereupon compelled to cease operations and further construction on said dam because of the failure of the said plaintiff to construct the said dam, or so much thereof as had been constructed at the time the said Big Lost River Irrigation Company was ordered and directed as aforesaid to cease construction thereon, in accordance with the terms and conditions of said contract and of the specifications thereof or therein referred to. And the said Big Lost River Irrigation Company will not be permitted, as these defendants are informed and believe, by the State of Idaho or the State Board of Land Commissioners or the State Engineer of said State to proceed with the completion of said dam without materially changing and reconstructing a large part of the work done by the said plaintiff, and for which it seeks to foreclose its said alleged lien; and by reason of the said default, failure, and neglect of plaintiff the said Big Lost River Irrigation Company became unable to borrow money or raise funds to proceed with the reconstruction of said dam and with the completion of said irrigation system, and the insolvency and inability of said company to meet its obligations [59] and pay its debts is due, as these defendants are informed and believe and so allege the fact to be, to the default and failure of said plaintiff to observe the terms of said contract and to do and to perform the work required of it thereunder in accordance

with the terms thereof and the specifications therein set forth, or therein referred to. That the loss and damage so sustained by the said Big Lost River Irrigation Company, and the depreciation of the assets of said company, securing its said first mortgage bonds, exceed, as these defendants are informed and believe, the amount claimed by the said plaintiff in its amended bill of complaint as due it from said Big Lost River Irrigation Company, and for which it seeks to foreclose its said lien; that by reason of the premises and the defaults, failures and neglects of the said plaintiff it is not entitled to and should not be decreed a lien for any sum whatsoever upon any of the property, rights, franchises or assets of said Big Lost River Irrigation Company.

19. Further answering, these defendants say that said Big Lost River Irrigation Company was incorporated under the laws of the State of Idaho on or about the 15th day of June, 1909, but no meeting of the stockholders, incorporators or directors of said company was held and no officers thereof were elected until on or about the 16th day of July, 1909, on which last-mentioned date the incorporators of said company elected a board of directors and authorized the exchange of substantially all of the capital stock of said company for the irrigation system described in the amended bill of complaint, which system, or a large part thereof, was then owned by one George S. Speer, who offered to exchange the same for the capital stock of said Big Lost River Irrigation Company. That at the meeting of the directors of said company, held on said date, no other action or busi-

ness was transacted than to elect officers and to accept the proposition of said George S. Speer to transfer to the company said irrigation works, or a large [60] part thereof, in exchange for substantially all of the capital stock of said Company, and said Big Lost River Irrigation Company had no interest whatsoever in said irrigation works until on or after said 16th day of July, 1909, and no contract for the construction of such works was authorized or considered at said meeting. That neither the directors nor the stockholders of said Big Lost River Irrigation Company held any meeting from the 16th day of July, 1909, until the 21st day of August, 1909, on which last-mentioned date a special meeting of the board of directors of said company was duly and legally called and held for the purpose of authorizing the issuance of the first mortgage bonds of said corporation to the amount of \$2,000,000.00, and for securing the payment thereof by a first mortgage or deed of trust upon all the property and assets of said corporation, and for the further purpose of authorizing the contract with the said plaintiff for the construction of said irrigation works. That at said meeting of the board of directors said board by resolution duly authorized the officers of said company to issue and deliver the first mortgage coupon bonds thereof to the amount aforesaid, and to secure the payment thereof by a first mortgage and deed of trust upon all the property, rights and franchises of said Big Lost River Irrigation Company. That the bonds so authorized to be issued and secured are the identical bonds held by the bondholders of said

Big Lost River Irrigation Company represented by these defendants, and for whom these defendants appear and defend in this suit. That after having authorized the issuance of said bonds and the execution and delivery of such first mortgage and deed of trust, the said directors further authorized the officers of the company to enter into a contract on behalf of the company with the said plaintiff for the construction of certain irrigation works. That the action of the directors in authorizing the issuance of said bonds and the execution of such first mortgage [61] and deed of trust to secure the same, was on said 21st day of August, 1909, ratified and approved by the stockholders of said company, duly assembled in a special meeting for such purpose.

That no contract with plaintiff had theretofore been authorized or entered into on behalf of said Big Lost River Irrigation Company by any of the officers of said company, or by the board of directors or stockholders thereof, and the said plaintiff had no contract whatsoever, either oral or written, with said Big Lost River Irrigation Company until after the 21st day of August, 1909; and the said plaintiff, as these defendants are informed and believe and so charge the fact to be, entered into its said contract with the Big Lost River Irrigation Company with full notice and knowledge that said Big Lost River Irrigation Company had first authorized and directed the issuance of its first mortgage bonds to the amount of \$2,000,000.00 to be secured by a first mortgage or deed of trust upon all the assets, property, rights and franchises of said corporation, and

that said plaintiff, its officers and agents, as these defendants are informed and believe, at all times knew that said bonds would be negotiable in character, and were and would be sold to the public as the first mortgage bonds of said Big Lost River Irrigation Company, and that they purported to be and were represented to be secured by first mortgage and deed of trust upon all its said property, rights and franchises, and that they were and would be sold to innocent purchasers for value under such representations and statements, and that the purchasers of such bonds purchased the same believing such statements and representations to be true, and that they would not have purchased such bonds had they known that such bonds were not secured by a first and prior lien upon all the property and assets of said corporation, or that the said plaintiff had or would claim a first and prior lien upon said property, rights and franchises. [62]

That the bonds of said Big Lost River Irrigation Company, purporting to be secured as aforesaid, were sold under the circumstances and representations stated, with the full knowledge of the said plaintiff, its officers and agents, and were purchased by innocent purchasers for value, who believed such representations and statements to be true, to the aggregate amount of \$1,378,500.00 par value, and these defendants are informed and believe that a large sum received by said Big Lost River Irrigation Company from the sale of said bonds, to wit: substantially \$700,000.00, was paid to the said plaintiff, and by plaintiff received and accepted for work

performed and material furnished under its said contract, authorized as aforesaid on the 21st day of August, 1909. That the said plaintiff at all times knew that said Big Lost River Irrigation Company had no other means of securing funds with which to pay for such work except by the sale of bonds as aforesaid, and that such bonds could not be sold except upon the representations and statements that the same were secured by first lien mortgage or deed of trust upon such irrigation works, and the rights and franchises of said Big Lost River Irrigation Company. And that the said plaintiff did not record or file for record in any public office for the registration of liens, contracts or mortgages, its said contract with the Big Lost River Irrigation Company, and the said plaintiff at all times knew that the purchasers of said bonds had no means of ascertaining or learning that the said plaintiff made or would make any claim of lien on said irrigation system which would be prior and superior to such mortgage, or otherwise; and the said plaintiff at all times knowing, as these defendants are informed and believe, that said bonds were being sold by the said Big Lost River Irrigation Company and purchased by innocent purchasers under the representations and circumstances herein stated, remained silent in regard to its claim of lien, and at no time [63] made any claim or statement showing or tending to show, or informed purchasers, or others, or the said trustees under said first mortgage and deed of trust, that it, the said plaintiff, claimed or would claim a lien on said irrigation works prior or superior to the

lien of such mortgage or deed of trust securing said bonds; and the said plaintiff, as these defendants are informed and believe, profited by such representations and statements, and received as hereinbefore stated, substantially \$700,000.00 of the proceeds from the sale of said bonds, and made no claim of lien until long after the said Big Lost River Irrigation Company had ceased selling said bonds, and until after the purchasers and holders thereof had purchased and paid for the same, and a large part of the proceeds thereof paid to the said plaintiff; and these defendants are further informed and believe, and so allege the fact to be, that much of the property upon which the said plaintiff claims a first and prior lien was acquired by said Big Lost River Irrigation Company, and paid for out of the moneys received by said Big Lost River Irrigation Company from the bondholders represented by these defendants in payment for the bonds of said company purchased and paid for under the representations and circumstances herein stated. That by reason of the premises the said plaintiff in justice, equity and good conscience should be decreed and held not entitled to a lien upon any of the property, rights or franchises of said Big Lost River Irrigation Company prior or superior to the lien of the mortgage or deed of trust securing said bonds; that the said plaintiff by its conduct and action in the premises is and should be estopped from claiming any lien on the property in said amended bill of complaint described, prior or superior to the lien of the mortgage or deed of trust securing the said bonds. [64]

20. Further answering, these defendants say that the irrigation system, dam, canals, works and structures described in plaintiff's amended bill of complaint, and in its said claim of lien, were constructed under section 4 of the Act of Congress approved August 18, 1894, commonly known as the Carey Act, and the acts amendatory thereof, and the laws enacted by the State of Idaho in pursuance of the powers granted by said Act of Congress and in furtherance of the objects thereof, and under and pursuant to a certain contract between the State of Idaho, and one George S. Speer, dated May 27, 1909, and the amendments thereto, which facts were known to plaintiff at the time it began construction under said contract. That said contract was duly assigned and transferred from said George S. Speer to the said Big Lost River Irrigation Company.

That the short particulars of said contract are as follows: The said irrigation works were to be constructed for the purpose of reclaiming said desert lands segregated under the said Act of Congress commonly known as the Carey Act, and when completed in accordance with the plans and specifications in said contract with the State of Idaho set forth or referred to, or to an extent sufficient to deliver water for irrigation purposes, the same were to be transferred to a corporation organized under the laws of the State of Idaho and known as the Lost River Water Company, which should thereafter have the management, ownership and control of said works and water rights, and each share of stock in said Lost River Water Company was to represent an

interest in said irrigation works, and a water right in such irrigation system sufficient for the irrigation of one acre of land, and all the stock of said Lost River Water Company, to wit: 100,000 shares of the par value of \$1.00 each, excepting the amount required for the [65] qualification of the directors, was to be issued to the said Big Lost River Irrigation Company, and by such company sold to owners of land and to persons filing on said Carey Act lands at a certain price or sum, payable ten per cent (10%) in cash at the time of purchase and the balance in nine annual installments; and each purchaser of a water right or interest in said irrigation system received and was to receive as evidence thereof one share of stock in said Lost River Water Company for each acre of land for which a water right was purchased. That the 100,000 shares of stock of said Lost River Water Company represented the estimated capacity of said irrigation system to the end that when water rights had been sold for the irrigation of all lands situated thereunder, all the stock of said Lost River Water Company would be held by the land owners, and the irrigation system owned by said Company. That the said Big Lost River Irrigation Company under said contract with the State of Idaho received only a franchise from said State to sell water rights in said irrigation system to the full capacity thereof upon the terms stated in said contract, and as security for the payment of the deferred payments due the Big Lost River Irrigation Company on the purchase price of water rights said Big Lost River Irrigation Com-

pany was given a lien and the right to contract for a lien on the lands for the irrigation of which water rights were sold in such system. And as collateral security for such deferred payments each purchaser of water rights was required to assign over to such Big Lost River Irrigation Company the certificate of stock in the Lost River Water Company purchased by him and evidencing such water right. That such certificates of stock and water rights were sold under a contract approved [66] by the State of Idaho, which contract provided that it should be a first and prior lien upon the lands therein described, and for which water rights were purchased. For a full and complete statement of the terms of the contract of May 27, 1909, between said Speer and the said State of Idaho, these defendants pray leave to refer to such contract when procured. And these defendants further pray leave to refer to the contract to be used by the Big Lost River Irrigation Company in the sale of water rights to owners of land or persons filing on such Carey Act lands when the same may be procured, for a full statement of the terms and conditions of such contract.

These defendants, upon their information and belief, allege the fact to be that the defendant, Big Lost River Irrigation Company, in accordance with the terms of said contract of May 27, 1909, with the State of Idaho, sold water rights in said irrigation system and shares of stock in said Lost River Water Company for approximately 62,201 acres at a total purchase price of substantially \$2,000,000.00, and that contracts for the sale of water rights ag-

gregating the principal sum of \$1,836,816. 27 in deferred payments have been deposited with the trustees under said first mortgage and deed of trust, as collateral security for the bonds, but no payments, as these defendants are informed and believe, can be collected under said contracts until such irrigation system has been substantially completed, or completed to an extent sufficient to deliver water to the purchasers of such water rights, as contemplated by the contracts under which said water rights and shares of stock were purchased. That the irrigation system described in plaintiff's amended bill of complaint has not been completed to an extent sufficient to deliver water, as these defendants are informed and believe, to any of said lands for the irrigation of which said Big Lost [67] River Irrigation Company has sold water rights in said system and shares of stock in said Lost River Water Company, or to any other lands. That the said contract of May 27, 1909, with the State of Idaho further provided that said irrigation system should be entirely completed on or before April 30, 1912; and these defendants are informed and believe that it will require \$500,000.00 or upwards to complete such irrigation system to an extent sufficient to deliver water to the lands for which water rights have been sold therein.

That by reason of the failure of the plaintiff to comply with the terms of its said contract with the Big Lost River Irrigation Company, and its failure to construct said works in accordance with the plans and specifications forming a part thereof, which plans and specifications had the approval of the

State Engineer of the State of Idaho and were the same plans and specifications included in the contract between said George S. Speer and the State of Idaho hereinbefore referred to, portions of the work already performed and structures partially completed have been condemned by the authorities of the State of Idaho, and the completion of said project prevented. That said irrigation system was designed as a single unit, and unless the same be wholly completed and in accordance with such plans and specifications, as set out in the contract referred to, the portions of said irrigation system already constructed are of little or no value and afford no security for the holders of said bonds so issued as hereinbefore stated, and the rights and property of said Big Lost River Irrigation Company in such project were and are subject to be forfeited to the State of Idaho. That by reason of the acts and conduct of the plaintiff in its failure to construct the works, so far as the same have already been constructed, in accordance with such plans and specifications, these answering defendants have been wholly deprived of the security and property upon which said bonds were based, and which were and are necessary [68] to give value to the same. That such departure by the plaintiff, as such contractor, from the contract plans and specifications for the construction of such works, was without authority and was and is in fraud of the rights of these defendants and destructive of the rights and property secured to these defendants under its said trust deed and mortgage.

That by reason of the premises and the facts herein alleged and set forth, the said plaintiff is not entitled under the laws of the State of Idaho or under the statutes of the United States hereinbefore referred to, to a lien upon such irrigation works, rights and franchises or upon the rights of said Big Lost River Irrigation Company under said contract with the State of Idaho, dated May 27, 1909, and the amendments thereof or on the said water contracts deposited with the said trustees as collateral security for said first mortgage bonds, or upon the shares of stock of said Lost River Water Company sold by said Big Lost River Irrigation Company to the purchasers of water rights and deposited with the trustees as additional security for the payment of said bonds.

21. Further answering, these defendants say that they are informed and believe and so allege the fact to be that the said plaintiff waived all claims to a mechanic's or other lien on the property, rights or franchises of said Big Lost River Irrigation Company, and accepted and received other securities from said Big Lost River Irrigation Company and others, and accepted the guarantees, promises and assurances of others, particularly the notes, promises, guarantees and assurances of Trowbridge & Niver Company, a corporation organized under the laws of the State of New Jersey and doing [69] business in the city of Chicago, State of Illinois, for the payment of the amounts due or to become due the said plaintiff from said Big Lost River Irrigation Company under its said alleged contract for the con-

struction of said irrigation works.

22. That said amendments are material and necessary to a proper defense of the case, and that the matters set up by way of amendment were not known to these defendants prior to the filing of the original answer.

WHEREFORE, these defendants pray that said amendments be allowed and be considered as a part of the answer on the hearing of the cause.

MAYER, MEYER, AUSTRIAN & PLATT,
Attorneys and Solicitors for Continental and Com-
mercial Trust and Savings Bank, and Frank H.
Jones, Trustee.

LACKNER, BUTZ & MILLER,
RICHARDS & HAGA,

Of Counsel. [70]

Let the within amendments be filed.

April 5, 1912.

DIETRICH,
Judge.

[Endorsed]: Filed April 5, 1912. [71]

[Title of Court and Cause.]

Order Allowing Certain Amendments to Answer.

The defendants, the Continental and Commercial Trust and Savings Bank, formerly named The American Trust and Savings Bank, and Frank H. Jones, trustees, having filed their request in writing for leave to amend the amended answer herein of said trustees by inserting immediately before the last paragraph of said answer the following:

"These defendants further show that they, these defendants, have requested to defendant, Big Lost River Irrigation Company to amend its answer herein by setting forth as fully as have these defendants the particulars wherein the complainant, Corey Bros. Construction Company, has failed to observe and comply with its contract with said irrigation company, and to offer testimony in support of such allegations to the same extent as have these defendants; but the said defendant Big Lost River Irrigation Company has refused the aforesaid request of these defendants. These defendants further show that said Big Lost River Irrigation Company has been insolvent since about the first of the year 1910, and, having before that time executed and delivered the trust deeds and bonds secured by the same, heretofore set forth in this answer, the said Big Lost River Irrigation Company from the time it so became insolvent had parted with all interest in the said irrigation system and project covered by said trust deeds, and a lien on which is sought to be established by complainant, and has since then had no interest therein; and that these defendants, representing said bondholders, are and have since said time been the successors in interest to said Big Lost River Irrigation Company; and that to permit the complainant to secure a lien prior to the lien of these defendants [72] would destroy the value of all of said bonds; that said Big Lost River Irrigation Company, defendant, has no funds with which to defend the suit of the complaint, nor any interest in so doing.

These defendants further show that at various times The Arnold Company, engineers, issued certificates for payment to the complainant for ninety per cent. (90%) of the work done. One Rosecrane was chief engineer in charge of the construction of said system, and said Rosecrans had no knowledge of the departures from the contract by Corey Bros. Construction Company, and the existence of such departures was wilfully concealed from said Rosecrans by the inspectors upon said work in the employ of said Arnold Company, under said Rosecrans."

The Court being fully advised in the premises doth hereby ORDER that said request be granted in part, to wit: That the said defendants be allowed to amend said amended answer by interlineation, and by inserting immediately before the last paragraph of said answer the following, to wit:

"These defendants further show that said Big Lost River Irrigation Company has been insolvent since about the first of the year 1910 and, having before that time executed and delivered the trust deeds and bonds secured by the same, heretofore set forth in this answer, the said Big Lost River Irrigation Company from the time it so became insolvent had parted with all interest in the said irrigation system and project covered by said trust deeds, and a lien on which is sought to be established by complainant, and has since then had no interest therein, and that these defendants, representing said bondholders, are and have since said time been the successors in interest to said Big

Lost River Irrigation Company; and that to permit the complainant to secure a lien prior to the lien of these defendants would destroy the value of all of said bonds; that said Big Lost River Irrigation Company, defendant, has no funds with which to defend the suit of the complainant, nor any interest in so doing.

These defendants further show that at various times The Arnold Company, engineers, issued certificates for payment to the complainant for ninety per cent (90%) of the work done. One Rosecrans was chief engineer in charge of the construction of said system, and said Rosecrans had no knowledge of the departures from the contract by Corey Bros. Construction Company, and the existence of such departures was wilfully concealed from said Rosecrans by the inspectors upon said work in the employ of said Arnold Company, under said Rosecrans."

And the additional amendment embraced in said request, and above set forth, is denied.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed Sept. 7, 1912. [73]

[Title of Court and Cause.]

**Bill of Complaint in Intervention of the Union
Portland Cement Company.**

To the Honorable Judges of the Circuit Court of the United States in and for the District of Idaho, in the Ninth Circuit, Sitting in Equity:
Union Portland Cement Company, a corporation,

by leave of Court first had and obtained, files this its bill of complaint in intervention in the above-entitled action.

Union Portland Cement Company, a corporation organized and existing [74] under and by virtue of the laws of the State of Utah, a citizen of the State of Utah, brings this its bill of complaint in intervention against the Corey Bros. Construction Company, a corporation organized and existing under and by virtue of the laws of the State of Utah, a citizen of the State of Utah, and the Big Lost River Irrigation Company, a corporation organized and existing under and by virtue of the laws of the State of Idaho, and a citizen of the State of Idaho, and The American Trust and Savings Bank, a corporation organized and existing under and by virtue of the laws of the State of Illinois, and a citizen of the State of Illinois, Nephi Hansen and Ephriam Hansen copartners under the firm name and style of Hansen Bros., citizens of the State of Idaho, K. L. Molen and R. E. Kutler, copartners under the firm name and style of Molen & Kutler, citizens of the State of Idaho, J. W. Curd and N. Foss, copartners under the firm name and style of Curd & Foss, citizens of the State of Idaho, K. L. Molen and Jesse Molen, copartners under the firm name and style of Molen & Molen, citizens of the State of Idaho, David Chamberlain and Thomas Chamberlain, copartners under the firm name and style of Chamberlain Bros., citizens of the State of Idaho, Frank H. Jones, a citizen of the State of Illinois, Frank Hess, a citizen of the State of Idaho, S. H. Walton, a citizen of the State

of Idaho, F. L. Pinney, a citizen of the State of Idaho, William Mooney, a citizen of the State of Idaho, and thereupon your orator complains and says:

Your orator shows unto this Court that on the 15th day of October, 1910, Corey Bros. Construction Company as a corporation in the above-entitled action, filed a bill of complaint in this court against the Big Lost River Irrigation Company, a corporation, et al., to foreclose a mechanic's lien against all the property of the Big Lost River Irrigation Company. That on or about the 29th day of May, 1911, in said action this Honorable Court appointed C. E. Clinton as receiver of all the property, both real and personal, of the Big Lost River Irrigation [75] Company, and that C. E. Clinton is now the duly appointed, qualified and acting receiver of all the property of said Big Lost River Irrigation Company.

Your orator further shows unto this Honorable Court that the above-entitled action, wherein Corey Bros. Construction Company, a corporation, is plaintiff, and the Big Lost River Irrigation Company, a corporation, et al., are defendants, is now at issue between the plaintiff and all of said defendants.

That on October 22d, 1910, your orator, as plaintiff, commenced an action in the above-entitled court against the Big Lost River Irrigation Company, a corporation, American Trust and Savings Bank, a corporation, and Frank H. Jones, as defendants, to foreclose a mechanic's lien, which mechanic's lien is hereinafter more fully described. That thereafter, on March 10th, 1911, the Big Lost River Irrigation

Company filed its answer in said action, and that on March 6th, 1911, the Continental and Commercial Trust and Savings Bank (formerly The American Trust and Savings Bank) and Frank H. Jones filed their answer in said action, and said action is now at issue between said plaintiff and said defendants, and said action is now pending in said court for final determination.

Your orator further shows unto this Honorable Court that there is no controversy existing between Corey Bros. Construction Company and your orator, and that said Corey Bros. Construction Company and your orator are seeking to establish their liens against the property of the Big Lost River Irrigation Company, and to have said liens to be declared a first lien upon all the property of said Big Lost River Irrigation Company, and that neither the Corey Bros. Construction Company or your orator is seeking to gain preference one over the other.

That your orator, Union Portland Cement Company, is now, and was at all the times hereinafter set out, a corporation organized and existing under and by virtue of the laws of the State of Utah, and is now, [76] and was at all the times hereinafter set out, a resident and citizen of the State of Utah.

That the plaintiff, Corey Bros. Construction Company, is now and was at all the times hereinafter set out, a corporation organized and existing under and by virtue of the laws of the State of Utah, and is now, and was at all the times hereinafter set out, a resident and citizen of the State of Utah.

That the defendant, Big Lost River Irrigation

Company is now and was at all the times hereinafter set out, a corporation organized and existing under and by virtue of the laws of the State of Idaho, and is now, and was at all the times hereinafter set out, a resident and citizen of the State of Idaho.

That the defendant, The American Trust and Savings Bank is now and was at all times hereinafter set out, a corporation organized and existing under and by virtue of the laws of the State of Illinois, and is now, and was at all the times hereinafter set out, a resident and citizen of the State of Illinois.

That the defendants Nephi Hansen and Ephriam Hansen are now and were at all the times hereinafter set out, copartners doing business under the firm name and style of Hansen Bros., and are now, and were at all the times hereinafter set out, residents and citizens of the State of Idaho.

That the defendants, K. L. Molen and R. E. Kutler, are now and were at all the times hereinafter set out, copartners doing business under the firm name and style of Molen & Kutler, and are now, and were at all the times hereinafter set out, residents and citizens of the State of Idaho.

That the defendants J. W. Curd and N. Foss are now and were at all the times hereinafter set out, copartners doing business under the firm name and style of Curd & Foss, and are now, and were at all the times hereinafter set out, residents and citizens of the State of Idaho.

That the defendants K. L. Molen and Jesse Molen are now and [77] were at all the times hereinafter set out, copartners doing business under the firm name and style of Molen & Molen, and are now, and

were at all the times hereinafter set out, residents and citizens of the State of Idaho.

That the defendants David Chamberlain and Thomas Chamberlain, are now and were at all the times hereinafter set out, copartners doing business under the firm name and style of Chamberlain Bros., and are now, and were at all the times hereinafter set out, residents and citizens of the State of Idaho.

That the defendant Frank H. Jones is now, and was at all the times hereinafter set out, a resident and citizen of the State of Illinois.

That the defendants Frank Hess, F. L. Pinney, S. H. Walton and William Mooney, are now and were at all the times hereinafter set out residents and citizens of the State of Idaho, within the meaning of the laws fixing and determining the jurisdiction of this Honorable Court.

Your orator further shows unto your Honorable Court that at all the times hereinafter mentioned your orator has transacted business and carried on operations as a contractor, in its corporate name and capacity, in the counties of Custer, Blaine, Bingham and Fremont, State of Idaho, and at all the times hereinafter set out had accepted the provisions of the Constitution, and had complied with the laws of the State of Idaho, relative to foreign corporations doing business within said State.

Your orator further shows unto this Honorable Court that on or about the 18th day of September, 1909, the defendant Big Lost River Irrigation Company entered into a written contract with your orator for the furnishing of cement to be used in the con-

struction of its canal system, which system is and was known as the "Big Lost River Irrigation System." That according to the terms of said contract your orator was to furnish to the defendant Big Lost River Irrigation Company all the [78] cement that said company should use during the years 1909 and 1910 upon its dam and ditch work, known as Big Lost River Land and Irrigation Company project, at the price of \$2.84 per barrel, in carload lots, F. O. B. Mackay and Moore, Idaho; sacks being extra. 1% discount off the net amount of cash in ten days; no discount allowed on sacks or freight. Said cement was to fulfill the specifications and requirements of the American Society of Civil Engineers, and the said Big Lost River Irrigation Company was to have the right to have cement tested at the factory before acceptance at Devil's Slide, Utah, if so desired. Said cement was to be packed in jute, cotton or canvas sacks, and charged to the purchaser at ten cents each. Upon all sacks returned, there was to be a discount of 10 cents a sack. Deliveries to be made at the rate of 2,000 to 4,000 barrels per month. That your orator was not to be held responsible for deliveries when prevented by strikes, lockouts, accidents, fires, floods, shortage of cars, or other causes over which it had no control. That if the said Big Lost River Irrigation Company failed to make payments when the same became due, or failed in any way to perform the conditions of said contract, your orator, at its option, had the right to cancel said contract.

Your orator further shows unto this Honorable Court that in pursuance of said contract, that it fur-

nished cement to the said defendant Big Lost River Irrigation Company, which according to the contract price amounted to the sum of \$37,406.88, and that it has been paid upon said amount by said Big Lost River Irrigation Company the sum of \$23,632.32, leaving a balance of \$13,774.56, which is now due to your orator from the said defendant Big Lost River Irrigation Company.

Your orator further shows unto this Honorable Court that the said defendant Big Lost River Irrigation Company had due notice of the furnishing of said cement, and that said cement was used in the construction of its said canal system, known as the Big Lost River Irrigation Company's system.

Your orator further shows unto this Honorable Court that the [79] last payment made by the said defendant Big Lost River Irrigation Company to it was on July 30th, 1910, and that said defendant Big Lost River Irrigation Company has failed, neglected and refused to make any further payments unto your orator, and that your orator has canceled said contract, as it had a right to do, and that there is now due to your orator the sum of \$13,774.56, together with interest thereon from the 25th day of June, 1910.

Your orator further shows unto this Honorable Court that on or about the 20th day of August, 1910, the same being less than 90 days after the last work done and materials furnished, your orator filed for record in the office of the County Recorder of Blaine, Bingham, Custer and Fremont Counties, Idaho (those being the counties where said work was done), a statement containing notice of intention to hold and

claim a lien, and a description of the property to be charged therewith, name of the owner or reputed owner, and name of the person by whom your orator was employed to do the work, with a statement of the terms and conditions of its contract, and an abstract of its indebtedness, showing the whole amount of the debt, and whole amount of credit, and the balance due or to become due to your orator, which statement was duly verified in accordance with law; that a copy of said statement or mechanic's lien is hereto attached to this bill, marked Exhibit "A," and is hereby referred to and is made a part of this bill of complaint, as though the same were fully set out in the body of this complaint.

Your orator further shows unto this Honorable Court, that said statement or mechanic's lien was filed with the County Recorder of Bingham County, State of Idaho, on the 25th day of August, 1910; in the County Recorder's office of Fremont County, State of Idaho, on the 23d day of August, 1910; in the County Recorder's office of Blaine County, State of Idaho, on the 20th day of August, 1910; in the County Recorder's office of Custer County, State of Idaho, on the 27th day of August, 1910.

Your orator further shows unto this Honorable Court, that the [80] property sought to be foreclosed under said mechanic's and contractor's lien so made and filed by your orator is as follows:

All the following lands in Custer County, State of Idaho: The Northeast Quarter of the Southeast Quarter (NE. $\frac{1}{4}$ SE. $\frac{1}{4}$) of Section Three (3), Lot Three (3) of Section Four (4), the Southeast

Quarter of the Northeast Quarter (SE. $\frac{1}{4}$ NE. $\frac{1}{4}$) of Section Five (5), the Northwest Quarter of the Northwest Quarter (NW. $\frac{1}{4}$ NW. $\frac{1}{4}$) and the South Half of the Northwest Quarter (S. $\frac{1}{2}$ NW. $\frac{1}{4}$) of Section Eleven (11), Township Seven (7) North, Range 23 East; the Southwest Quarter (SW. $\frac{1}{4}$) of Section Thirty-three (33), Township Eight (8) North, Range Twenty-three (23) East, Boise Meridian, in all 405.25 acres, more or less.

All the reservoirs, dams, canals, ditches, laterals, head-gates, coulees, draws, flumes, rights of way and of flowage, easements, permits, privileges and franchises for dams, reservoirs, canals, ditches and laterals, and, in general, the entire irrigation works, project, and system in Blaine, Bingham, Custer and Fremont Counties, State of Idaho, commonly known as the Big Lost River Irrigation System, and any addition or extension thereto, now constructed by the company, or which it may hereafter construct or acquire, together with all franchises and powers, privileges and appurtenances connected therewith.

All the right to divert and use the waters of the Big Lost River and Antelope Creek in the State of Idaho, and all other rights under the following permits:

Permit No. 1507, to appropriate the waters of Big Lost River and its tributaries to an amount equivalent to a continuous flow of one thousand (1,000) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 5 of Permits, at page 1507.

Permit No. 1513, to appropriate the waters of An-

telope Creek to an amount equivalent to a continuous flow of one hundred (100) cubic feet per second, as the same appears of record in the office of the [81] State Engineer of the State of Idaho, in Book 5 of Permits, at page 1513;

Permit No. 1748, to appropriate the waters of Big Lost River and its tributaries to an amount equivalent to a continuous flow of two hundred (200) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 6 of Permits, at page 1748;

Permit No. 4061, being an amendment to Permit No. 1507 to appropriate the waters of the Big Lost River and its tributaries, as the same is of record in the office of the State Engineer of the State of Idaho, in Book 11 of Permits, at page 4061;

Permit No. 4062, being an amendment to Permit No. 1513, to appropriate the waters of Antelope Creek, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 11 of Permits, at page 4062.

Permit No. 4063, being an amendment to Permit 1748, to appropriate the waters of the Big Lost River and its tributaries, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 11 of Permits, at page 4063.

Permit No. 4946, to appropriate the waters of Big Lost River and its tributaries to an amount equivalent to a continuous flow of one thousand (1,000) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 14 of Permits, at page 4946.

Permit No. 4960, to appropriate the waters of Antelope Creek to an amount equivalent to a continuous flow of five hundred (500) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 14 of Permits, at page 4960.

That certain right of way for the Big Lost River Reservoir, situated in Townships 7 and 8 North, Range 23 East, Boise Meridian, Custer [82] County, State of Idaho, approved by the Acting Secretary of the Interior, August 2d, 1906, for a more particular description of which reservoir reference is hereby made to the map and field-notes thereof filed in the United States Land Office at Hailey, Idaho, on the first day of August, 1905, and to the field-notes of the survey thereof, with witness points and witness corners of Townships 7 and 8 North, Range 23 East, Boise Meridian, filed in said office July 13th, 1908; and to the amended map and amended field-notes showing the definite location of said reservoir, filed in the United States Land Office at Hailey, Idaho, on the 18th day of June, 1909.

That certain right of way for the Big Lost River Canals, situated in Townships 3, 4, 5 and 6 North, Ranges 25, 26 and 27 East, Boise Meridian, in Blaine and Custer Counties, State of Idaho, approved by the Acting Secretary of the Interior, August 2d, 1906, for a more particular description of which right of way reference is hereby made to the map and field-notes thereof, filed in the United States Land Office at Hailey, Idaho, on the first day of August, 1905.

That certain right of way for the Lower Big Lost

River Reservoir in Sections 21 and 28, Township 3 North, Range 27 East, Boise Meridian, approved by the Secretary of the Interior on April 27, 1906, for a more particular description of which reservoir reference is hereby made to the map and field-notes thereof, filed in the United States Land Office at Hailey, Idaho.

That certain right of way for the Lower Big Lost River Canals, situated in Township 3 North, Range 27 East, Boise Meridian, in Blaine County, State of Idaho, approved by the Commissioner of the General Land Office by letter F, dated April 20th, 1906, for a more particular description of which right of way reference is hereby made to the map and field-notes thereof, filed in the United States Land Office at Hailey, Idaho.

That certain right of way for the Antelope Reservoir situated [83] in Township 4 North, Range 24 East, Boise Meridian, in Blaine and Custer Counties, State of Idaho, application for which was filed in the United States Land Office, Hailey, Idaho, on June 18th, 1909, for a more particular description of which reservoir reference is hereby made to the map and field-notes thereof filed in said land office on said day.

All the rights, grants, interests, privileges, easements and franchises acquired by the company under or in that certain contract dated May 27th, 1909, made by and between the State of Idaho, through its State Board of Land Commissioners, and George S. Speer, and by said George S. Speer, transferred and assigned to the company, for the construction of an ir-

rigation system and works for the reclamation under the provisions of the Carey Act of approximately one hundred thousand (100,000) acres of land in the Big Lost River Valley in the counties of Custer, Blaine, Bingham and Fremont, in the State of Idaho; as well as under any similar contract that may be made between the State of Idaho and the company, and any amendment to the above-mentioned present contract, for the construction of irrigation works and systems in Idaho under the Carey Act, constituting extensions or additions to its said present system.

All the contracts heretofore made by the company, or its predecessors in interest, or which may be hereafter entered into by the company with settlers for the sale of water rights for water to be taken from or through said irrigating system, as the same is now or may be hereafter constituted, and all mortgages, constituting, to the extent of the unpaid portion of the purchase price of such water rights, first liens on the lands irrigated thereunder.

All right, title and interest in and to said Idaho State Desert Land List No. 31, and the proposition made by said George S. Speer under the name of G. S. Speer to the State Board of Land Commissioners for the irrigation of the lands mentioned in said list.

Your orator further shows unto this Honorable Court that it has [84] fully kept and performed its part of said contract and agreement, and has furnished the material to the Big Lost River Irrigation Company, as required by said contract.

Your orator, upon information and belief, alleges

that under and by virtue of a certain deed of trust, dated July 1st, 1909, and recorded in the office of the County Recorder of Bingham County on the 3d day of September, 1909, and also recorded in Blaine County on the 3d day of September, 1909, and also recorded in Fremont County on the 4th day of September, 1909, and also recorded in the County Recorder's Office of Custer County on the 8th day of September, 1909, the defendants The American Trust and Savings Bank, a corporation, and Frank H. Jones, are, or attempted to be, made trustees for the defendant Big Lost River Irrigation Company, for the intent and purpose of granting to and authorizing The American Trust and Savings Bank and Frank H. Jones, as such trustees, authority to secure and obtain a loan, and to authorize the issuing of two million dollars' worth of bonds. That under and by virtue of said deed of trust the said defendant Big Lost River Irrigation Company, as your orator is informed and believes, and therefore alleges the fact to be, conveyed to The American Trust and Savings Bank and Frank H. Jones, as such trustee, all its right, title, claim and interest in and to said canal system, lands, rights of way and appurtenances, and being the property, or a portion of the property covered by your orator's said lien and hereinbefore described. Your orator further shows, upon information and belief, that said trust deed was not acknowledged until after the 26th day of August, 1909, and was not filed for record until after the 2d day of September, 1909.

Your orator, upon information and belief, alleges

that under and by virtue of a certain deed of trust, dated January 1st, 1910, the defendants The American Trust and Savings Bank, a corporation, and Frank H. Jones, are, or attempted to be, made trustees for the defendant Big Lost River Irrigation Company, for the intent and purpose of granting [85] to and authorizing the American Trust and Savings Bank and Frank H. Jones, as such trustees, authority to secure and obtain a loan, and to authorize the issuing of four hundred thousand dollars' worth of collateral trust bonds. That under and by virtue of said deed of trust the said defendant Big Lost River Irrigation Company, as your orator is informed and believes, and therefore alleges the fact to be, conveyed to The American Trust and Savings Bank and Frank H. Jones, as such trustee, all its right, title, claim and interest in and to said canal system, lands, rights of way and appurtenances, and being the property, or a portion of the property covered by your orator's said lien and hereinbefore described.

And your orator further shows unto this Honorable Court that whatever right, title, claim or interest may be created by said deeds of trust, or now had or held by The American Trust and Savings Bank and Frank H. Jones, as trustee, is subsequent, inferior and subject to the lien and claim of your orator herein.

Your orator further shows unto this Honorable Court that the defendants Nephi Hansen and Ephriam Hansen, copartners under the firm name and style of Hansen Bros., K. L. Molen and R. E. Kutler,

copartners under the firm name and style of Molen & Kutler, J. W. Curd and N. Foss, copartners under the firm name and style of Curd & Foss, K. L. Molen and Jesse Molen, copartners under the firm name and style of Molen & Molen, David Chamberlain and Thomas Chamberlain, copartners under the firm name and style of Chamberlain Bros., Frank Hess, S. H. Walton, F. L. Pinney and William Mooney, have and claim to have some right, title or interest in and to the property hereinbefore described, by reason of certain mechanic's liens which said defendants have filed upon said property for work, labor and material furnished, as contractors and subcontractors, upon the system known as the Big Lost River Irrigation System or project.

Your orator further shows that said defendants are proper parties [86] to a full and complete determination of the issues involved in this action, as your orator is informed and believes, and so states the fact to be, that said liens and claims are true, but in what amounts the same are just, your orator at this time has not sufficient information to fully set forth in this bill of complaint, and that said defendants should be required to appear in this action, and if any claim they have, to set it forth, in order that all the claims of both plaintiff and defendants may be finally adjudicated in this action.

Your orator further alleges that said property as herein described is not separable, nor can the same be used, sold or realized upon in any other way than as an entirety.

Your orator further shows unto this Honorable

Court that it has been compelled to and has employed counsel, and that for the services of said counsel in preparing said lien herein and foreclosing the same, that the sum of \$1,500.00 is a reasonable attorney's fee to be allowed herein.

Your orator further shows unto this Honorable Court that the last material furnished was on the 25th day of June, 1910.

Your orator further shows unto this Honorable Court that while the written contract that was entered into between your orator and the defendant Big Lost River Irrigation Company was not signed until the 18th day of September, 1909, that your orator commenced furnishing said cement to said Big Lost River Irrigation Company on the 26th day of August, 1909, and that all of said cement that was furnished from the 26th day of August, 1909, up to and including the 18th day of September, 1909, was done at the special instance and request of the defendant Big Lost River Irrigation Company, and under and in pursuance to the terms of the contract which bears date of September 18th, 1909, and that said contract, while it was not signed until September 18th, 1909, the terms of said contract were in full force and effect on the 26th day of August, 1909.

[87]

Your orator further shows unto this Honorable Court that the system known as the Big Lost River Irrigation System is incomplete; that is to say, that the dam at Mackay is about half completed, and that about 90% of all the dams and ditches are completed.

Your orator further shows unto this Honorable

Court that the dam at Mackay, Idaho, is at this time in such a condition that more money should be spent upon it, in order to protect the work that has already been done.

Your orator further shows unto this Honorable Court that the Big Lost River Irrigation Company is insolvent, and unable to pay its debts, and that a receiver should be appointed for said corporation.

In consideration whereof, and inasmuch as your orator is remediless in the premises at and by the strict rules of the common law, and are only reliev-able in a court of equity, where matters of this kind are properly recognizable and relievable, your orator therefore prays the aid of this Honorable Court that the mechanic's lien hereinbefore set out may be de-creed to be a lien upon all the property of the de-fendant Big Lost River Irrigation Company, as described in said lien within the jurisdiction of this Honorable Court. That the said defendant Big Lost River Irrigation Company may be decreed to pay unto your orator the amount due upon the contract as hereinbefore set out and as secured by said me-chanic's lien, to wit, the sum of \$13,774.56, together with legal interest thereon from the 25th day of June, 1910, together with \$1,500.00 attorney's fee, and all costs and expenses incurred and expended, and in default thereof that the said Big Lost River Irrigation Company, and all persons claiming under it, or either of them, may be forever debarred and foreclosed from all equity of redemption and claim of, in and to the said premises, and every part and parcel thereof, and all and singular the premises as

covered by said mechanic's lien, with all the appurtenant property and effects, rights and franchises in said mechanic's lien mentioned, may be sold under a decree of this Honorable Court, and that out of the [88] money arising from the sale thereof, after deducting from the proceeds of such sale just allowance for all disbursements and expenses of the said sale, including attorney's and counsel fees, to apply said proceeds to the payment of the amount due to your orator upon said contract, and said mechanic's lien, together with interest and costs. And your orator further prays that a receiver may be appointed according to the practice of this Court, with the usual powers of receivers in like cases, of all property that is described in said mechanic's lien, and that the defendant Big Lost River Irrigation Company, and The American Trust and Savings Bank and Frank H. Jones, be decreed to make said transfer or conveyance to such receiver, and to the purchaser or purchasers of said property, at any sale as aforesaid as may be necessary and proper to put them, or either of them, in possession or control of said property. And your orator further prays that a decree of this Court be entered declaring whatever interest the defendants The American Trust and Savings Bank, a corporation, and Frank H. Jones, may have in and to said property to be inferior and subsequent to plaintiff's claim.

And may it please your Honor to grant unto your orator a subpoena of the United States of America, issued out of and under the seal of this Honorable Court, directed to the defendants Big Lost River

Irrigation Company, a corporation; The American Trust and Savings Bank, a corporation; Nephi Hansen and Ephriam Hansen, copartners under the firm name and style of Hansen Bros.; K. L. Molen and R. E. Kutler, copartners under the firm name and style of Molen & Kutler; J. W. Curd and N. Foss, copartners under the firm name and style of Curd & Foss; K. L. Molen and Jesse Molen, copartners under the firm name and style of Molen & Molen; David Chamberlain and Thomas Chamberlain, copartners under the firm name and style of Chamberlain Bros.; Frank Hess, S. H. Walton, F. L. Pinney, William Mooney and Frank H. Jones, therein and thereby commanding them, on a day certain therein to be named, and under [89] a certain penalty, to be and appear before this Honorable Court, then and there to answer (but not under oath), all and singular the premises, and to stand, to perform and abide by the order, direction and decree as may be made against them in the premises as shall seem meet and agreeable to equity and good conscience, but in case any of said parties have appeared by counsel, then, and in that case, a copy of this bill of complaint in intervention can be served upon the attorneys of parties so appearing, and such parties shall have such time to answer or to plead to the same as is pre-

vs. Corey Bros. Construction Company et al. 103
scribed by the rules of this Court.

And your orator will ever pray.

UNION PORTLAND CEMENT COMPANY,

By JAMES PINGREE,

Secretary.

H. H. HENDERSON,

Solicitor for Plaintiff. Postoffice Address,
Ogden, Utah, First National Bank
Building. [90]

[Exhibit "A" to Complaint in Intervention.]

State of Idaho,

Counties of Blaine, Bingham,

Custer and Fremont,—ss.

UNION PORTLAND CEMENT COMPANY,

Claimant,

vs.

BIG LOST RIVER IRRIGATION COMPANY,
Owner.

NOTICE OF INTENTION TO HOLD AND
CLAIM A LIEN.

TO WHOM IT MAY CONCERN:

NOTICE IS HEREBY GIVEN, That the Union Portland Cement Company is a corporation duly organized and existing under and by virtue of the laws of the State of Utah, with its principal place of business at Ogden, Weber County, Utah; and at all the times hereinafter mentioned, said company was and is doing business in its corporate name in Blaine, Bingham, Custer and Fremont Counties, State of Idaho; and at all times has accepted the provisions of the Constitution, and complied with the laws of

the State of Idaho, relative to foreign corporations doing business with said State.

That the Big Lost River Irrigation Company is a corporation organized and existing under and by virtue of the laws of the State of Idaho, and as such has been and now is doing business in its corporate name in said Blaine, Bingham, Custer and Fremont Counties, State of Idaho.

That the claimant Union Portland Cement Company holds and claims and hereby gives notice of lien for materials furnished, at the special instance and request of the said Big Lost River Irrigation Company, used in the construction of those certain canals and reservoirs, known as the Big Lost River Irrigation System.

That the said Big Lost River Irrigation Company is the [91] owner of said irrigation system, together with all the appurtenances thereunto belonging, or in anywise appertaining, and including laterals, dams, headgates, rights of way, lands, interest in lands, and rights hereinafter referred to and described more fully, and all situated in the Counties of Blaine, Bingham, Custer and Fremont, State of Idaho.

That the said Big Lost River Irrigation Company caused said reservoirs, canals, ditches, laterals, dams and headgates and works to be constructed.

That the Union Portland Cement Company, on or about the 18th day of September, 1909, entered into a contract with the Big Lost River Irrigation Company to furnish certain cement to said Big Lost River Irrigation Company, which contract is in words and figures as follows, to wit:

CONSTRUCTION CONTRACT.

THIS AGREEMENT, Made this 18th day of September, 1909, Witnesseth, That Union Portland Cement Company agrees to sell, and The Big Lost River Irrigation Company, Mackay, Idaho, agrees to buy and take delivery of during the year 1909-10 all the cement required for the construction of Dam and Ditch work known as the Big Lost River Land and Irrigation Company project, Mackay, Idaho, or twenty-five Thousand Barrels of Red Devil Cement (four sacks equalling a barrel), at the price of Two Dollars and Eighty-four cents, per barrel, in carload lots F. O. B. Mackay and Moore, Idaho, sacks extra. Delivery at central freight station, any charges for switching or demurrage at destination to be at expense of purchaser. Purchaser hereby agrees to take delivery at destination, subject to the rules and regulations of transportation company delivering same. Freight to be paid by purchaser and same to be credited to purchaser's account upon return to seller of received freight bill. This contract shall last during the year 1910 and shall expire with the 31st day of December of that year.

TERMS.—30 days; 1 per cent, off the net amount for cash in 10 days; no discount allowed on sacks or freight.

QUALITY.—Cement to be guaranteed to fulfill the specifications and requirements of the American Society of Civil Engineers. Seller's liability to cease when cement is delivered to the U. P. Co. at Devil's Slide, Utah. Purchaser to have the right to have cement tested at the factory before acceptance at

Devil's Slide, Utah, if desired.

SACKS.—Cement to be packed in jute, cotton or canvas sacks and charged to purchaser at 10 cents each. The seller to pay 10 cents each for empty Red Devil Cement sacks returned by the [92] purchaser to the seller in good condition. The seller's count and acceptance of sacks returned to be the basis of credit. Purchaser to pay the railroad freight on returned sacks.

DELIVERIES.—Deliveries are to be taken by the purchaser at the rate of 2000 to 4000 as advised barrels per month during 1909 and 10.

Seller shall not be held responsible for deliveries when prevented by strikes, lockouts, accidents, fires, floods, shortage of cars, or other causes over which seller has no control.

If purchaser fails to make any payment hereunder when the same becomes due, or fails in any way to perform the conditions of this contract, the seller may, at its option, cancel contract. Time is and shall be the essence of this agreement.

This contract shall not become operative or binding upon the Union Portland Cement Company until it has been approved by one of the Executive Officers of said Company at the home office in Ogden, Utah, and a copy with such approval forwarded to purchaser.

IN WITNESS WHEREOF, the seller and purchaser have hereunto set their hands and affixed their

vs. Corey Bros. Construction Company et al. 107
seals in duplicate the day and year first above written.

Seller:

UNION PORTLAND CEMENT COMPANY,

By JAMES PINGREE, Secretary.

Purchaser:

BIG LOST RIVER IRRIGATION CO.,

By C. B. HURTT, President.

That pursuant to the contract hereinbefore set out, the said Union Portland Cement Company did, on the dates hereinafter mentioned, furnish to the said Big Lost River Irrigation Company the following cement:

That the following is an itemized statement of all cement furnished and all credits which have been paid upon said statement:

1909.

Aug.	26	106 Bbls.....	\$ 205.65
"	28	106 "	205.65
Sept.	5	125 "	408.75
"	14	125 "	242.50
"	16	125 "	242.50
"	16	150 "	490.50
"	18	230 "	752.10
"	23	225 "	735.75
"	28	225 "	767.25
Oct.	8	212 "	686.88
"	10	225 "	729.00
"	5	230 "	745.20
"	5	280 "	907.20
"	16	212 "	445.20

1909.

Oct.	17	135	Bbls.....	\$	283.50
"	20	160	"		518.40
"	22	160	"		518.40
"	24	212	"		686.88
"	30	185	"		599.40

[93]

Oct.	31	160	Bbls.....		518.40
Nov.	2	160	"		518.40
"	4	160	"		518.40
"	7	160	"		518.40
"	11	160	"		518.40
"	13	160	"		518.40
"	15	160	"		518.40
"	20	225	"		729.00
"	23	160	"		518.40
"	24	160	"		518.40
"	26	160	"		336.00
"	27	160	"		518.40
Dec.	17	225	"		472.50
"	18	212	"		445.20
"	23	160	"		518.40

1910.

Jan.	21	200	"		420.00
"	26	200	"		420.00
Feb.	3	Freight paid.....			228.00
"	10	170	Bbls.....		357.00
"	11	170	"		357.00
"	11	170	"		357.00
"	19	170	"		357.00
Mar.	28	200	"		648.00
"	31	125	"		262.50
Apr.	1	200	"		648.00

"	2	125	"	.....	405.00
"	3	125	"	.....	405.00
"	5	125	"	.....	405.00
"	5	125	"	.....	405.00
"	5	200	"	.....	648.00
"	6	125	"	.....	405.00
"	7	125	"	.....	405.00
"	7	125	"	.....	369.37
"	10	125	"	.....	405.00
"	13	150	"	.....	315.00
"	20	200	"	.....	420.00
"	25	180	"	.....	378.00
"	26	150	"	.....	486.00
"	26	150	"	.....	486.00
"	26	180	"	.....	378.00
"	26	140	"	.....	294.00
May	3	200	"	.....	648.00
Apr.	22	200	"	.....	420.00
May	4	180	"	.....	583.20
"	5	150	"	.....	486.00
"	10	180	"	.....	583.20
"	10	200	"	.....	648.00
"	11	200	"	.....	648.00
June	2	200	"	.....	648.00
"	2	200	"	.....	648.00
"	4	125	"	.....	262.50
"	7	Freight prepaid on car 83017..			205.20
"	12	150	Bbls.	.....	315.00
"	14	200	"	.....	420.00
"	16	170	"	.....	550.00
"	18	200	"	.....	420.00

1910.

June 20	180	"	.....	.....	\$ 378.00
" 22	170	"	.....	.....	550.80
" 25	225	"	.....	.....	472.50
<hr/>					
					\$37,406.88

[94]

CREDITS.

1909.

Oct. 2	Cash.....	.....	.....	\$ 411.30
" 15	" .....	.....	.....	3,639.35
" 20	Freight paid.....	.....	.....	517.65
" 29	" "	.....	.....	619.12
" 29	" "	.....	.....	508.92
" 29	" "	.....	.....	25.65
" 29	" "	.....	.....	40.28
" 15	Cash.....	.....	.....	4,926.84
" 15	Overcharge.....	.....	.....	74.01
Nov. 22	Cement sacks returned.....	.....	.....	92.02
" 24	" " "	.....	.....	173.80
Dec. 15	Cash.....	.....	.....	5,390.77
" 16	Cement sacks returned.....	.....	.....	257.84
" 16	" " "	.....	.....	417.23

1910.

Jan. 11	"	"	"	.....	102.81
" 11	"	"	"	.....	106.20
" 15	Cash.....	.....	.....	.....	658.22
" 27	Cement sacks returned.....	.....	.....	.....	65.63
Feb. 18	Cash.....	.....	.....	.....	668.17
" 7	Diversions charge.....	.....	.....	.....	2.00
" 7	Under charge.....	.....	.....	.....	8.74
" 7	" " "	.....	.....	.....	10.64
" 28	Cement sacks returned.....	.....	.....	.....	129.05

Mar. 15	Cash.....	1,505.57
"	9 Cement sacks returned and refund from R. R.....	13.24
Apr. 16	Cash.....	634.76
May 12	Cement sacks returned.....	263.62
" 15	Freight.....	106.87
" 26	Cement sacks returned.....	375.86
" 26	" " "	171.90
June 18	" " "	83.86
" 18	" " "	216.10
" 18	" " "	367.02
" 23	" " "	276.40
July 20	" " "	128.90
" 20	" " "	59.00
" 30	" " "	279.02
" 30	" " "	303.96
		<hr/>
		\$23,632.32

Balance due \$13,774.56.

That the first material was furnished by said Union Portland Cement Company on or about August 26th, 1909, and that the last material was furnished on the 25th day of June, 1910.

That all of said material was used by the said Big Lost River Irrigation Company in constructing that certain irrigation system known as Big Lost River Irrigation System, in Blaine, Bingham, Custer and Fremont Counties, State of Idaho. [95]

That there is now due and owing to the Union Portland Cement Company, claimant, from the Big Lost River Irrigation Company, owner, the sum of \$13,774.56, after deducting all just credits and off-

sets, and that a lien is claimed for said amount upon all the ditches, dams, laterals, irrigation system works, water rights, rights of way, masonry work, reservoirs, iron and wood structures, headgates, lands, interest in lands, and rights and property of every nature and appurtenant thereto of the Big Lost River Irrigation System, and which property is more specifically described as follows:

All of the following lands in Custer County, State of Idaho: The Northeast quarter of the Southeast quarter (NE. $\frac{1}{4}$ SE. $\frac{1}{4}$) of Section Three (3), Lot Three (3) of Section Four (4), the Southeast quarter of the Northeast quarter (SE. $\frac{1}{4}$ NE. $\frac{1}{4}$) of Section Five (5), the Northwest quarter of the Northwest quarter (NW. $\frac{1}{4}$ NW. $\frac{1}{4}$) and the South half of the Northwest quarter (S. $\frac{1}{2}$ NW. $\frac{1}{4}$) of Section Eleven (11), Township Seven (7) North, Range 23 East; the Southwest quarter (SW. $\frac{1}{4}$) of Section Thirty-three (33), Township Eight (8) North, Range Twenty-three (23) East, Boise Meridian, in all 405.25 acres, more or less.

All the reservoirs, dams, canals, ditches, laterals, headgates, coulees, draws, flumes, rights of way and of flowage, easements, permits, privileges and franchises for dams, reservoirs, canals, ditches and laterals, and, in general, the entire irrigation works, project, and system in Blaine, Bingham, Custer and Fremont Counties, State of Idaho, commonly known as the Big Lost River Irrigation system, and any addition or extension thereto, now constructed by the company, or which it may hereafter construct or acquire, together with all franchises and powers,

privileges and appurtenances connected therewith.

All the right to divert and use the waters of the Big Lost River and Antelope Creek in the State of Idaho, and all other rights under the following permits:

Permit No. 1,507, to appropriate the waters of Big Lost River and its tributaries to an amount equivalent to a continuous flow of [96] one thousand (1,000) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho in Book 5 of Permits, at page 1,507;

Permit No. 1,513, to appropriate the waters of Antelope Creek to an amount equivalent to a continuous flow of one hundred (100) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 5 of Permits, at page 1,513;

Permit No. 1,748, to appropriate the waters of Big Lost River and its tributaries to an amount equivalent to a continuous flow of two hundred (200) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 6 of Permits, at page 1,748.

Permit No. 4,061, being an amendment to Permit No. 1,507, to appropriate the waters of the Big Lost River and its tributaries, as the same is of record in the office of the State Engineer of the State of Idaho, in Book 11 of Permits, at page 4,061.

Permit No. 4,062, being an amendment of Permit No. 1,513, to appropriate the waters of Antelope Creek, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book

11 of Permits, at page 4,062.

Permit No. 4,063, being an amendment to Permit No. 1,748, to appropriate the waters of the Big Lost River and its tributaries, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 11 of Permits, at page 4,063.

Permit No. 4,946, to appropriate the waters of Big Lost River and its tributaries to an amount equivalent to a continuous flow of one thousand (1,000) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 14 of Permits, at page 4,946. [97]

Permit No. 4,960, to appropriate the waters of Antelope Creek to an amount equivalent to a continuous flow of five hundred (500) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 14 of Permits, at page 4,960.

That certain right of way for the Big Lost River Reservoir, situated in Township 7 and 8 North, Range 23 East, Boise Meridian, Custer County, State of Idaho, approved by the Acting Secretary of the Interior, August 2d, 1906, for a more particular description of which reservoir reference is hereby made to the map and field notes thereof filed in the United States Land Office at Hailey, Idaho, on the first day of August, 1905, and to the field notes of the survey thereof, with witness points and witness corners of Townships 7 and 8 North, Range 23 East, Boise Meridian, filed in said office July 13th, 1908; and to the amended map and amended field notes showing the definite location of said reservoir, filed

in the United States Land Office at Hailey, Idaho, on the 18th day of June, 1909.

That certain right of way for the Big Lost River Canals, situated in Townships 3, 4, 5 and 6 North, Ranges 25, 26 and 27 East, Boise Meridian, in Blaine and Custer Counties, State of Idaho, approved by the Acting Secretary of the Interior August 2d, 1906, for a more particular description of which right of way reference is hereby made to the map and field notes thereof, filed in the United States Land Office, at Hailey, Idaho, on the first day of August, 1905.

That certain right of way for the Lower Big Lost River Reservoir, in Sections 21 and 28, Township 3 North, Range 27 East, Boise Meridian, approved by the Secretary of the Interior on April 27, 1906, for a more particular description of which reservoir reference is hereby made to the map and field notes thereof, filed in the United States Land Office at Hailey, Idaho.

That certain right of way for the Lower Big Lost River Canals, [98] situated in Township 3 North, Range 27 East, Boise Meridian, in Blaine County, State of Idaho, approved by the Commissioner of the General Land Office by letter F, dated April 20th, 1906, for a more particular description of which right of way reference is hereby made to the map and field notes thereof, filed in the United States Land Office at Hailey, Idaho.

That certain right of way for the Antelope Reservoir situated in Township 4 North, Range 24 East, Boise Meridian, in Blaine and Custer Counties, State of Idaho, application for which was filed in the

United States Land Office, Hailey, Idaho, on June 18th, 1909, for a more particular description of which reservoir reference is hereby made to the map and field notes thereof filed in said land office on said day.

All the rights, grants, interests, privileges, easements and franchises acquired by the company under or in that certain contract dated May 27th, 1909, made by and between the State of Idaho, through its State Board of Land Commissioners, and George S. Speer, and by said George S. Speer transferred and assigned to the Company for the construction of an irrigation system and works for the reclamation under the provisions of the Carey Act of approximately one hundred thousand (100,000) acres of land in the Big Lost River Valley in the Counties of Custer, Blaine, Bingham and Fremont in the State of Idaho; as well as under any similar contract that may be made between the State of Idaho and the company, and any amendment to the above mentioned present contract, for the construction of irrigation works and systems in Idaho under the Carey Act, constituting extensions or additions to its said present system.

All the contracts heretofore made by the company, or its predecessors in interest, or which may be hereafter entered into by the company with settlers for the sale of water rights for water to be taken from or through said irrigation system, as the same is now or may be hereafter constituted, and all mortgages, constituting, to the extent of the unpaid portion of the purchase price of such [99] water rights, first

liens on the lands irrigated thereunder.

All right, title and interest in and to said Idaho State Desert Land List No. 31, and the proposition made by said George S. Speer under the name of G. S. Speer to the State Board of Land Commissioners for the irrigation of the lands mentioned in said list.

WHEREFORE, the Union Portland Cement Company, a corporation, claimant, hereby claims and gives notice that it holds and claims a lien upon all the property hereinbefore described, and upon the whole thereof, for the sum of \$13,774.56, together with legal rate of interest thereon from the 25th day of June, 1910, under and by virtue of the provisions of the Statutes of Idaho relating to liens and preferred claims of mechanics and others in such cases made and provided.

Dated this 9th day of August, 1910.

UNION PORTLAND CEMENT COMPANY,

By JAMES PINGREE,

Secretary.

Attest: [Seal] JAMES PINGREE,
Secretary.

State of Utah,

County of Weber,—ss.

James Pingree, being first duly sworn, on oath says: That he is Secretary of the Union Portland Cement Company, a corporation, claimant in the foregoing notice of lien, and as such is authorized to make and verify this lien; that he has read the above and foregoing claim and notice of lien, and knows the contents thereof, and the same is true and just, and the statements therein contained of the

demand of the claim of said Union Portland Cement Company against the Big Lost River Irrigation Company for material furnished upon and in the construction of said canal system are correct, and that said materials were furnished as [100] therein stated, and that there is now due and owing said Union Portland Cement Company from the Big Lost River Irrigation Company after deducting all just credits and off-sets, the sum of \$13,774.56.

JAMES PINGREE.

Subscribed and sworn to before me this 9th day of August, 1910.

[Seal]

E. F. BRATZ,
Notary Public.

My commission expires August 8, 1913.

[Endorsed]: Filed Jan. 4, 1912. A. L. Richardson, Clerk. [101]

[Title of Court and Cause.]

[Answer of Continental and Commercial Trust and Savings Bank and Frank H. Jones to Bill of Complaint in Intervention.]

THE JOINT AND SEVERAL ANSWER OF THE CONTINENTAL AND COMMERCIAL TRUST AND SAVINGS BANK (FORMERLY NAMED THE AMERICAN TRUST AND SAVINGS BANK), A CORPORATION, AND FRANK H. JONES, DEFENDANTS, TO THE INTERVENING BILL OF COMPLAINT OF THE UNION PORTLAND CEMENT COMPANY.

Now come Continental and Commercial Trust and Savings Bank (formerly named The American Trust and Savings Bank) and Frank H. Jones, and jointly and severally reserving unto themselves all manner and benefit of exception to the numerous errors, uncertainties and insufficiencies in the said intervening bill of complaint aforesaid, with like effect as if these defendants had severally demurred thereto, for answer to the said intervening bill of complaint, or to such parts thereof as these defendants are advised it is necessary or material for them to make answer unto, answering say: [102]

1. These defendants are not advised, save by the allegations of the said intervening bill of complaint, whether or not the intervening complainant is a corporation organized under the laws of the State of Utah, or whether it is a resident or citizen of the State of Utah, and pray that the said intervening complainant may be required to make strict proof of its allegations in that behalf, but these defendants admit that the defendant, Continental and Commercial Trust and Savings Bank, under its former name of The American Trust and Savings Bank, was, at the time of the filing of the intervening bill of complaint herein and still is a citizen and resident of the State of Illinois, and that the defendant, Frank H. Jones, is also a citizen and resident of the State of Illinois, but these defendants are not advised, save by the allegations of the said intervening bill of complaint, as to the residence and citizenship of the other defendants to the said intervening bill of complaint, and pray that the said intervening complainant may

be required to make strict proof of its allegations in that behalf.

2. Further answering these defendants admit that on or about the 15th day of October, 1910, Corey Bros. Construction Company filed a bill of complaint in this court against the Big Lost River Irrigation Company, and that on or about May 29, 1911, this Court appointed C. E. Clinton as receiver of the property of the Big Lost River Irrigation Company, and that [103] C. E. Clinton is now the receiver of the property of the said Big Lost River Irrigation Company; but these defendants are not advised, save by the allegations of said intervening bill of complaint, as to whether or not said action instituted by said Corey Bros. Construction Company is now at issue between the said complainant and all of the defendants thereto, and pray that the said intervening complainant may be required to make strict proof of its allegations in that behalf.

3. Further answering these defendants admit that on or about October 22, 1910, the intervening complainant commenced an action in this court against the Big Lost River Irrigation Company, and these defendants, to foreclose a certain alleged mechanic's lien, and that thereafter these defendants filed their answers to the bill of complaint in said cause, but these defendants are not advised, save by the allegations of said bill of complaint, as to whether an answer in said cause has been filed by the Big Lost River Irrigation Company, or as to whether said action is now at issue between the complainant therein and all of the defendants, and pray that the

said complainant may be required to make strict proof of its allegations in that behalf.

4. Further answering, these defendants say that they are not advised, save by the allegations of the said intervening bill of complaint, as to whether there is no controversy between Corey Bros. Construction Company and the intervening complainant [104] or as to whether Corey Bros. Construction Company or the intervening complainant is seeking to gain a preference one over the other, and pray that the said intervening complainant may be required to make strict proof of its allegations in that behalf.

5. Further answering, these defendants say that they are not advised, save by the allegations of the said intervening bill of complaint, as to whether or not said intervening complainant has complied with the provisions of the constitution and laws of Idaho relative to foreign corporations, nor are these defendants advised as to whether or not intervening complainant was, at the time of the filing of the bill of complaint, or at the time of the furnishing of the material alleged in said bill of complaint, authorized to carry on business or maintain suits in the State of Idaho, or in the said courts, and these defendants pray that the said intervening complainant may be required to make strict proof in that regard; nor are these defendants advised as to whether or not, at the times mentioned in said intervening bill of complaint, said intervening complainant transacted business or carried on operations as a contractor in its corporate name, and capacity, in the counties of Custer, Blaine, Bingham and Fremont, in the State of

Idaho, and pray that the said intervening complainant may be required to make strict proof of its allegations in that regard. [105]

6. Further answering, these defendants say that they are not informed, save by the allegations of said intervening bill of complaint, as to whether or not the defendant, Big Lost River Irrigation Company, entered into any contract with the said intervening complainant upon the 18th day of September, 1909, or at any other time, nor are these defendants advised as to the terms of said alleged contract, nor whether any such supposed contract purporting to be the contract of the Big Lost River Irrigation Company was, in fact, the valid and properly executed and binding contract of said Big Lost River Irrigation Company, nor as to the terms of payment, or as to the price to be paid for the material alleged to be furnished under any such contract; and these defendants pray that the said intervening complainant may be required to make strict proof of each of the allegations of its bill of complaint in that behalf, as against these defendants.

7. Further answering, these defendants say that they are not advised, save by the allegations of the said intervening bill of complaint, as to what cement, if any, has been furnished by the intervening complainant, nor as to the price or value of said cement, nor as to whether or not any such cement alleged to have been furnished was used in the construction of the canal system known as the Big Lost River Irrigation Company's system, nor as to whether or not the said cement was of a character and quality cor-

responding to the terms of said alleged [106] contract, nor as to whether or not the use of the said cement in fact added anything to the value of the said property of the Big Lost River Irrigation Company in said intervening bill of complaint described, nor as to what payments have been made on account of said alleged furnishing of cement, nor as to whether the defendant, Big Lost River Irrigation Company, has refused to make further payments to the intervening complainant, or as to whether the intervening complainant has canceled the said contract, or as to the amounts claimed to be due to the intervening complainant on said alleged contract, and these defendants pray that said intervening complainant may be required to make strict proof of each of the allegations of its intervening bill of complaint in that behalf, as against these defendants.

8. Further answering, these defendants say that they are advised and believe, and therefore allege the fact to be, that any contract in writing entered into between the intervening complainant and said Big Lost River Irrigation Company was valid and binding only from the date of its execution and delivery.

9. Further answering, these defendants say that they are not advised, save by the allegations of the said intervening bill of complaint, as to whether or not said intervening complainant has filed for record any notices whatsoever in any county in the State of Idaho, or as to what are the contents [107] of any purported notices claimed to have been so filed in any county in said State, nor are these defendants advised, save by the allegations of said intervening

bill of complaint, as to whether or not any purported copy of any notice attached to the said intervening bill of complaint, is a true copy of any notice actually filed in any county in said State, and these defendants pray that the intervening complainant may be required to make strict proof of the allegations of its bill of complaint in that regard.

10. Further answering, these defendants say that they are not advised, save by the allegations of said intervening bill of complaint, as to whether or not the intervening complainant fulfilled and performed its part of said alleged contract and agreement with said Big Lost River Irrigation Company, or as to whether it furnished the material to the said Big Lost River Irrigation Company required in and by said alleged contract, and these defendants pray that the intervening complainant may be required to make strict proof of the allegations of its intervening bill of complaint in that regard.

11. Further answering, these defendants admit that the said Big Lost River Irrigation Company, by virtue of its certain deed of trust dated January 1, 1909, and recorded in the various counties in the State of Idaho as set forth in said intervening bill of complaint, did convey to these defendants, as trustees, all and singular the property described in the [108] said intervening bill of complaint alleged to be the property sought to be foreclosed under and by virtue of the mechanic's lien claimed by said intervening complainant in said intervening bill of complaint, and these defendants say they are advised and believe, and therefore charge the fact to be, and

claim the said lien created by said deed of trust was not subsequent, inferior, or subject to any lien or claim of the intervening complainant in said intervening bill of complaint, but, on the contrary thereof, these defendants allege that the lien created by the said deed of trust was prior and paramount to any claim of the intervening complainant herein, and remains and still is a valid first lien upon the property in the trust deed described, and these defendants beg leave to refer to the original of said mortgage, or deed of trust, and the record thereof as the same is spread of record in the Recorder's office of the various counties, with like effect as if these defendants had set forth the said deed of trust and each of the provisions thereof, according to its and their legal effect, in this answer.

12. These defendants further show that in and by said trust deed it was, among other things, provided, in addition to the said conveyance of the said property hereinbefore referred to, that the Big Lost River Irrigation Company should assign to and deposit with these defendants, as trustees, as additional security for the payment of bonds of the said [109] Big Lost River Irrigation Company of the par value of Two Million (\$2,000,000.) Dollars, the said deed of trust authorized to be issued, all contracts for the purchase of water rights for the irrigation of portions of the land described in Idaho State Desert Land Lists numbered 8, 18 and 31, which contracts were and are known as settlers' contracts, and these defendants aver that, in fact, there having been issued and certified by these defendants, and are

now outstanding, bonds of the par value of One Million Three Hundred and Seventy-eight Thousand Five Hundred (\$1,378.500.) Dollars, secured by said mortgage, or deed of trust, all of which, together with interest due and accrued thereon, now remain wholly outstanding and unpaid, and these defendants state that there have been duly assigned and deposited with these defendants as trustees, all of the said settlers' contracts, as these defendants are informed and believe and therefore allege, which have been issued or executed by said Big Lost River Irrigation Company, and these defendants are informed and believe, and therefore state the fact to be, that the said deed of trust, or mortgage, and the said bonds, are a valid and subsisting first lien not only upon the property in said deed of trust and hereinbefore described, but upon the said settlers' contracts and each thereof, and that the lien of said mortgage, or deed of trust, and of the said bonds secured thereby, is, as these defendants are informed and believe, and therefore allege the fact to be, prior to any claim or demand on the part of the said intervening complainant [110] herein; and these defendants upon information and belief deny that the claim of these defendants, as trustees, and the interest created by the said deed of trust, is in any way subsequent, inferior or subject to the lien and claim of the intervening complainant herein.

13. Further answering, these defendants admit and say that afterwards, and on or about the first day of January, A. D. 1910, said Big Lost River Irrigation Company duly executed, acknowledged and

delivered to these defendants (defendant Continental and Commercial Trust and Savings Bank being then named and called The American Trust and Savings Bank), its certain mortgage or deed of trust denominated "A Collateral Trust Mortgage to Secure its Collateral Trust Bonds for the Aggregate Sum of \$400,000.00, with interest evidenced by coupons thereto attached, at the rate of 6% per annum," which said collateral trust mortgage was duly recorded in the recorder's office of the county of Blaine, in the State of Idaho, on the 28th day of March, 1910, and duly recorded in the Recorder's office of the county of Bingham in said State on the 28th day of March, 1910, and duly recorded in the Recorder's office of the County of Custer in said State on the first day of April, 1910, and duly recorded in the Recorder's office of the County of Fremont in said State on the 8th day of April, 1910, in and by which said collateral trust mortgage, the said Big Lost River Irrigation Company transferred and conveyed to these defendants all [111] and singular the same property theretofore transferred and conveyed to these defendants under said deed of trust hereinbefore referred to, but in said collateral trust mortgage it was specially provided and set forth that the conveyance therein made and the security thereby given for the said \$400,000.00 of collateral trust bonds was and should be subject to the prior accruing indebtedness of the said deed of trust dated July 1, 1909, hereinbefore described; and these defendants say that subject to the security and lien of the said deed of trust dated July 1, 1909, as hereinbefore described, the

said Big Lost River Irrigation Company by its said collateral trust mortgage conveyed all and singular the said property upon substantially the same terms and conditions as in said deed of trust of July 1, 1909, as hereinbefore set forth and contained, and these defendants say that under said collateral trust mortgage there were issued and are now outstanding collateral trust bonds of the par value of Two Hundred Thousand (\$200,000.00) Dollars, together with coupons now overdue and unpaid thereon, evidencing the interest thereon, which said collateral trust mortgage and the bonds secured thereby are, as these defendants are informed and believe and therefore allege the fact to be, a lien upon all the property in said mortgage described, and upon said settlers' contracts, subsequent only to the lien of the said deed of trust of July 1, 1909, and are prior to any claim or demand on the part of the said intervening complainant herein; [112] and these defendants on information and belief deny that the claim of these defendants, as trustees under said collateral trust mortgage, and the interest created by said collateral trust mortgage, is in any way subsequent, inferior or subject to the alleged lien and claim of the intervening complainant herein.

14. Further answering, these defendants say they are not advised, save by the allegations of said intervening bill of complaint, as to any claims of any of the other defendants to said intervening bill of complaint by reason of certain mechanic's liens claimed to be filed by certain other defendants, and these defendants pray that the said intervening complainant

may be required to make strict proof of the allegations of its intervening bill of complaint in that regard, and these defendants say that they are informed and believe, and therefore allege the fact to be, that the lien of said mortgages and deeds of trust to these defendants hereinbefore described, are prior, superior and paramount to any claim or demand on the part of any other defendants alleged to have filed mechanic's liens upon the property of the Big Lost River Irrigation Company.

15. Further answering, these defendants say they are not advised, save by the allegations of the said intervening bill of complaint, as to whether or not any of the defendants thereto alleged to have mechanic's liens are proper parties to a full and complete determination of the issues involved herein, and [113] pray that the intervening complainant may be required to make strict proof of the allegations of its intervening bill of complaint in that regard, as against these defendants.

16. Further answering, these defendants say they are not advised, save by the allegations of said intervening bill of complaint, as to whether or not the property described in said intervening bill of complaint is separable or can be used, sold or realized upon in any other way than as an entirety, and in so far as the intervening complainant may be advised that such allegations are necessary or material, these defendants pray that the intervening complainant may be required to make strict proof thereof.

17. Further answering, these defendants say that they are not informed, save by the allegations of said

intervening bill of complaint, as to what, if any, attorneys' fees were incurred by the said intervening complainant, nor as to what would be a reasonable and proper fee for the said intervening complainant's attorneys; wherefore, these defendants neither admit nor deny the allegations of the said intervening bill of complaint in that respect, but these defendants deny that any such attorneys' fee is a lien upon the premises described in the intervening bill of complaint as against the lien of the said bonds and deed of trust and collateral trust mortgage hereinbefore described. [114]

18. Further answering, these defendants say that they are not advised, save by the allegations of the said intervening bill of complaint, as to when the last material was furnished by said intervening complainant, and pray that the intervening complainant may be required to make strict proof of the allegations of its intervening bill of complaint in that regard.

19. Further answering, these defendants say they are not advised, save by the allegations of the said intervening bill of complaint, as to the date of the signing of any alleged contract between said intervening complainant and the Big Lost River Irrigation Company, nor as to when said intervening complainant commenced furnishing cement to said Big Lost River Irrigation Company, nor as to the period of time during which any cement was furnished by said intervening complainant, or whether it was furnished at the special instance and request of the defendant, Big Lost River Irrigation Company, and these defendants pray that the interven-

ing complainant may be required to make strict proof of each and all of the allegations in its intervening bill of complaint in that regard, and these defendants, further answering, say that they are not advised, save by the allegations of the said intervening bill of complaint, as to the date of any such alleged contract between the intervening complainant and Big Lost River Irrigation Company, nor as to the date of signing any such alleged contract, and these defendants pray that the said intervening complainant may be [115] required to make strict proof of the allegations in said intervening bill of complaint in that regard; and further answering, these defendants deny that any alleged contract between said intervening complainant and said Big Lost River Irrigation Company was in full force and effect on August 26, 1909, and these defendants say that any contract in writing entered into between the complainant and the said Big Lost River Irrigation Company was valid and binding only from the date of its execution and delivery.

20. Further answering, these defendants say they are not informed, save by the allegations of said intervening bill of complaint, as to the condition of the Big Lost River Irrigation Company's system, or as to the condition of the dam at Mackay therein described, or as to the percentage of completion of all of the dams and ditches comprised in the Big Lost River Irrigation Company's system, or as to whether any additional work is required to be done, or as to whether any additional money should be spent in order to protect the work already done upon said Big

Lost River Irrigation Company's system; or as to whether or not the said Big Lost River Irrigation Company is insolvent; and these defendants neither admit nor deny the allegations of the intervening bill of complaint in that regard, but pray that the intervening complainant may be required to make strict proof of each of its allegations in that regard. [116]

21. Further answering, these defendants say that they are informed and believe, and therefore allege the fact to be, that under the laws of the State of Idaho, and under the laws of the United States of America, the said intervening complainant is not entitled to any mechanic's lien upon the said property in the said intervening bill of complaint described, or against the said settlers' contracts hereinbefore referred to, or as against the bonds and mortgage and collateral trust mortgage hereinbefore described, and these defendants claim the same advantage of this claim of defense as if these defendants had demurred to the said intervening bill of complaint upon that ground.

22. Further answering, these defendants say that they are informed and believe, and therefore state the fact to be, that the proceeds of the said bonds so issued and outstanding, and secured by the said deeds of trust and by the assignment of the said settlers' contracts, were used in and about the work of constructing said irrigation works and dams, and that large amounts of the proceeds of said bonds have been paid to the intervening complainant herein, and that as to so much of the proceeds of said bonds as has been applied to the payment of the cost of con-

struction of said dams and irrigation works, and as to so much of the proceeds of said bonds as has been applied to the payment of the said intervening complainant for work done by it upon said irrigation works and dams, these defendants, as trustees for said bondholders, are entitled in equity [117] and good conscience to a lien upon all the said property, at least co-ordinate with any lien claimed by the said intervening complainant, apart from the rights arising from the execution and recording of said deeds of trust, and arising from the assignment and deposit of the settlers' contracts aforesaid.

23. Further answering, these defendants say that under and by virtue of the terms of the said deed of trust and collateral trust mortgage, these defendants, upon any default on the part of the said Big Lost River Irrigation Company, are entitled to the possession and control of all the property in said deed of trust and collateral trust mortgage described, and these defendants allege that under the said provisions of said deed of trust and collateral trust mortgage, these defendants are entitled to the possession and control of all the property in said intervening bill of complaint described, as against the said intervening complainant herein, or as against any person appointed as receiver under the said intervening bill of complaint, or under the bill of complaint of the Corey Bros. Construction Company herein; and these defendants claim that as trustees under said deed of trust and collateral trust mortgage they are entitled to any moneys received by any receiver appointed by this Court under the bill of complaint of

the Corey Bros. Construction Company, or under the intervening bill of complaint herein, and that these defendants are entitled to a first and prior lien upon any assets coming into the hands of any such [118] receiver, and these defendants pray that their rights in these regards may be protected in any order which may be entered herein, pending the further hearing of this suit, upon the prayer of the bill of complaint or the intervening bill of complaint herein, for the appointment of a receiver, or otherwise.

24. As to each of the allegations of the said intervening bill of complaint herein not in this answer either expressly admitted or denied, these defendants pray that the intervening complaint may be required to make strict proof of each of said allegations of said intervening bill of complaint, as against these defendants.

25. Further answering, these defendants deny that the intervening complainant is entitled to any of the relief prayed for in the said intervening bill of complaint.

WHEREFORE, having fully answered the intervening bill of complaint herein, these defendants pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

CONTINENTAL AND COMMERCIAL
TRUST AND SAVINGS BANK (Formerly named THE AMERICAN TRUST AND SAVINGS BANK), and FRANK H. JONES, Defendants,
By MAYER, MEYER, AUSTRIAN & PLATT, and N. M. RUICK,
Their Solicitors.

MAYER, MEYER, AUSTRIAN & PLATT,

Chicago, Illinois,

N. M. RUICK,

Boise, Idaho,

Solicitors and of Counsel for Continental and Commercial Trust and Savings Bank (formerly named The American Trust and Savings Bank) and Frank H. Jones, Defendants.

[Endorsed]: Filed Feb. 3, 1912. [119]

[Title of Court and Cause.]

**Answer of the Big Lost River Irrigation Company to
the Complaint in Intervention of the Union
Portland Cement Company.**

I.

Comes now the Big Lost River Irrigation Company, a corporation, and saving and reserving to itself all manner of benefit and advantage of exception to the numerous errors, uncertainties and insufficiencies in the said bill of complaint of the Union Portland Cement Company contained, with like effect as if this defendant had demurred thereto, for answer to the said bill of complaint, or to such parts thereof as this defendant is advised it is necessary or material for it to make answer unto, answering says:

II.

1. This defendant is not advised, save by the allegations of the said bill of complaint, whether or not the plaintiff is a corporation organized under the laws of the State of Utah, or whether it is a resident

or citizen of the State of Utah, and prays that the said plaintiff may be required to make strict proof of its allegations in that behalf. [120]

2. Further answering, this defendant says that it is not advised, save by the allegations of said bill, as to whether the plaintiff in said bill has complied with the provisions of the Constitution and laws of the State of Idaho relative to foreign corporations, nor is this defendant advised as to whether or not the plaintiff was, at the time of the filing of the bill of complaint, or at the time of the furnishing of the alleged material in said bill of complaint described, authorized to carry on business or maintain suits within the State of Idaho, or in this court, and the defendant prays that the plaintiff may be required to make strict proof of its allegations in that regard.

3. Further answering, this defendant says that it is not advised, save by the allegations of said bill of complaint, as to what cement, if any, has been furnished by the plaintiff, nor as to the price or value of such cement, nor as to whether such cement alleged to have been furnished and used in the construction of the, or any, canal system of this defendant, nor as to whether the said cement was of a character or quality corresponding to the terms of said contract.

4. Further answering, this defendant says that it is advised and believes and therefore alleges the fact to be that any contract in writing entered into between the plaintiff and the defendant was valid and binding only from the date of its execution and delivery.

5. Further answering, this defendant denies that

plaintiff has furnished cement under the contract referred to in the bill of complaint to this defendant of the value of, or which, according to contract price amounted to the sum of Thirty-seven Thousand Four Hundred Six Dollars Eighty-eight Cents (\$37,406.-88), and denies that the sum of Thirteen Thousand Seven Hundred Seventy-four Dollars Fifty-six Cents (\$13,774.56), together with interest thereon, is now due by this defendant to plaintiff on account of cement so alleged to have been furnished. [121]

6. Further answering, this defendant says that it is not advised, save by the allegations of the said bill of complaint, as to whether or not the said plaintiff has filed for record any notices whatsoever of intention to claim a lien in any county in the State of Idaho, or as to what are the contents of any purported notices of lien claimed to have been so filed, nor is this defendant advised, save by the allegations of said Bill, as to whether or not the, or any, purported copy of said, or any, notice, attached to the said bill of complaint, is in fact a true copy of any notice actually filed, as alleged in said bill of complaint, and this defendant prays that the plaintiff may be required to make strict proof of the allegations of its bill of complaint in that regard.

7. Further answering, this defendant denies that plaintiff has a mechanic's or contractor's lien upon all or any contracts heretofore made by this defendant company, or its predecessor in interest, or upon any contracts which it may hereafter enter into with settlers for the sale of water rights or water to be taken from or through the irrigation system de-

scribed in the said complaint, as the same is now or may be hereafter constructed, and denies that plaintiff has, or is entitled to, a lien upon any mortgages constituting, to the extent of the unpaid portion of the purchase price of such water rights, first liens on the land irrigated thereunder; but this defendant avers that all such contracts and mortgages have been, and were, by this defendant company, at various times during the furnishing of materials referred to in the bill of complaint, assigned for value and delivered to The American Trust and Savings Bank and Frank H. Jones, trustees, as additional and collateral security for the payment of certain bonds issued by this defendant company for the purpose of procuring the money wherewith to construct said irrigation system, and that the moneys admitted by said plaintiff to have been [122] received by it from this defendant company on account of such materials were, to a large extent, the proceeds of the sales of bonds of this company secured in part by the transfer, assignment and delivery to said trustees of the contracts and mortgages referred to, and the said contracts and mortgages are now held and owned by the said trustee for the purpose for which the same were so transferred, assigned and delivered.

9. Further answering, denies that plaintiff has fully kept and performed its part of the agreement and contract referred to in the bill of complaint, or has furnished the materials required by it.

10. Further answering, this defendant denies that the sum of Fifteen Hundred (\$1500) Dollars is a

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reasonable attorney's fee to be allowed to plaintiff in this action.

11. Further answering, this defendant denies that the dam at Mackay, Idaho, constituting a part of the irrigation system of this defendant, was, at the time of the filing of the bill of complaint, or is now, in such condition that more money should be, or is required to be spent upon it in order to protect the work that has already been done thereon.

As to each of the allegations of the bill of complaint herein not in this answer expressly admitted or denied, this defendant prays that the plaintiff may be required to make strict proof of each of such allegations of said bill of complaint as against this defendant.

WHEREFORE, this defendant prays to be hence dismissed with its costs and charges in this behalf wrongfully sustained.

BIG LOST RIVER IRRIGATION COMPANY.

By C. B. HURTT,
President.

LYNNE FOX CLINTON,
Attorney for Defendant, Big Lost River Irrigation
Company. [123]

[Endorsed]: Filed March 1, 1912. [124]

[Title of Court and Cause.]

Order Appointing Receiver.

The matter of the application for the appointment of a receiver for the above-named defendant, Big

Lost River Irrigation Company, coming on to be heard and it appearing to the Court that the defendants above named have been duly notified to appear, H. H. Henderson, Esq., appearing as attorney and solicitor on behalf of the plaintiff in making the application, and N. M. Ruick, Esq., appearing as attorney and solicitor for the Big Lost River Irrigation Company and the Continental and [125] Commercial Trust and Savings Bank, successor to The American Trust and Savings Bank, trustee, and Frank H. Jones, trustee, and consenting to the appointment of such receiver and the other defendants not appearing in person or by counsel:

Upon reading and considering the verified bill in this cause, together with the affidavit of W. W. Corey, president of the plaintiff corporation, and it appearing to the Court that this is a proper case for the appointment of a receiver;

IT IS THEREFORE ORDERED by the Court that Jas. E. Clinton, Jr., resident of Boise, Idaho, be and he is hereby appointed receiver of the said Big Lost River Irrigation Company, defendant in said action and of all and singular the property, assets, rights, reservoirs, dams, canals, ditches, laterals, headgates, coolies, draws, flumes, rights of way and of flotage, easements, permits, privileges and franchises for dams, reservoirs, and ditches and laterals, and, in general, the entire works, project and system in Blaine, Bingham, Fremont and Custer Counties, in the State of Idaho, of the defendant, Big Lost River Irrigation Company, together with all other property in connection therewith, and all moneys, choses

in action, credits, bonds, stocks, leasehold interests, operating contracts, and other assets of every kind, and all other property, real, personal and mixed, held or possessed by the Big Lost River Irrigation Company. The said receiver is hereby authorized and directed to take immediate possession of all and singular the property above described, wherever situated or found, subject, however, to all rights and equities of any and all persons, associations or corporations therein; to have and to hold the same as the officer of and under the orders and directions of the Court.

And said Big Lost River Irrigation Company, and each and every of its officers, directors, agents and employees are hereby [126] required and commanded forthwith to turn over and deliver to such receiver or his duly constituted representative, any and all books of accounts, vouchers, papers, leases, deeds, contracts, bills, notes, accounts, money, or other property in its or their hands or under his or their control. Said receiver is hereby fully authorized to do and perform such acts as may be necessary to preserve the property of said Big Lost River Irrigation Company and to collect and receive all incomes therefrom and all debts due said company of every kind.

And said receiver is directed to deposit the moneys coming into his hands in some bank or banks in the city of Boise, State of Idaho, and to report his selection to the Court.

Said receiver is hereby fully authorized and empowered to institute and prosecute all such suits as may be necessary, in his judgment, to the proper

protection of the property and trust hereby vested in him, and likewise defend all actions instituted against him as receiver, and also to appear in and conduct the prosecution or defense of any and all suits or proceedings now pending in any court against said company, the prosecution or defense of which will, in the judgment of said receiver, be necessary and proper for the protection of the property, and rights placed in his charge, and for the interest of the creditors and stockholders of said company.

Said receiver is hereby required to give bond in the sum of \$5,000.00 with security satisfactory to this Court, for the faithful discharge of his duties, and is also required to make and file reports in this court quarterly, and at such other times as the Court may order.

And the Court reserves the right by orders herein-after to be made to direct and control the payment of all supplies and materials, and in all other respects to enlarge, restrict, [127] regulate and control the powers and conduct of said Receiver.

Dated this 29th day of May, 1911.

FRANK S. DIETRICH,

District Judge.

And thereupon came in open court said James E. Clinton, Jr., and accepted such order and was there-upon duly sworn according to law and tendered bond according to said order, with and as sureties thereon, which bond is hereby approved and accepted.

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District Judge.

[Endorsed]: Filed May 31, 1911. [128]

[Title of Court and Cause.]

**[Stipulation That Certain Affidavits, etc., be Taken
and Considered as Evidence.]**

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the respective parties to the above-entitled cause, that the affidavits of Amos C. Miller, W. H. Rosecrans, Ralph G. Arnold, Samuel Storrow, and Frank Coy, and the letter of W. S. Collins hereto attached shall be taken and considered as part of the evidence in this cause, and the statements made by the said affiants and by the said W. S. Collins in said affidavits and in the said letter hereto attached shall be given the same force and effect as if such statements, and each of them, had been made by the said parties upon oath upon examination before the Special Examiner and by him certified and reported with the balance of the testimony taken before him in this cause.

IT IS FURTHER STIPULATED AND AGREED that the blue-print hereto attached shall be given the same force and effect as if regularly offered in evidence on the hearing of the cause before the said Examiner, with the identification and explanations contained in the affidavits and letter hereto attached. [129]

The said evidence is offered on behalf of the defendants, The Continental and Commercial Trust and Savings Bank and Frank H. Jones, as trustees, and is admitted subject to objections to relevancy

and materiality made by counsel for complainant to other testimony on the same subject matter.

Dated this 23d day of July, 1912.

H. H. HENDERSON,

Solicitor for Complainant.

MAYER, MEYER, AUSTRIAN & PLATT,
N. M. RUICK,

Solicitors for Defendants, Continental and Commercial Trust and Savings Bank, and Frank H. Jones, Trustees.

AMOS C. MILLER,
RICHARDS & HAGA,

Of Counsel for Defendants, Continental and Commercial Trust and Savings Bank, and Frank H. Jones, Trustees. [130]

[Title of Court and Cause.]

[Affidavit of Amos C. Miller.]

Amos C. Miller, being first duly sworn, states that he is one of the counsel for the defendant trustees in the above-entitled cause; that he attended the hearings and taking of testimony before Special Commissioner McCracken in Boise, Idaho, from June 21st to June 24th, inclusive; that he reached Chicago on the return from said trip on July 5th, 1912, and that the transcript of the testimony taken during the above-mentioned sessions reached affiant about July 8th, 1912, and about the same date affiant received a letter, a copy of which is hereto attached, from W. S. Collins, and also about said date received from said Collins the map, a blue-print copy of which is hereto attached, which map was made by said Col-

lins on his last visit to the Mackay dam as described in his said letter.

Affiant further states that during the above-mentioned sessions before said Special Commissioner McCracken testimony was produced by complainant tending to show that Ralph G. Arnold, an officer of the Arnold Company, and W. H. Rosecrans, also at that time connected with said Arnold Company, made certain statements to the effect that the Corey Brothers Construction Co. had done its work strictly in accordance with the contract, plans and specifications between the Big Lost River Irrigation Company and the Corey Brothers Construction Company; and as [131] affiant construed said testimony, tending to show an acceptance of said work by said Arnold Company through the parties above mentioned, to wit, said Arnold and said Rosecrans.

Affiant further says that to-day, July 13th, 1912, is the first opportunity that affiant has had since the receipt of said transcript of testimony to confer with said Ralph G. Arnold or said W. H. Rosecrans and that said Ralph G. Arnold and said W. H. Rosecrans have to-day stated to affiant as follows, and that they will so testify:

Said Ralph G. Arnold states the facts to be and that he will testify that during the whole year of 1910 he was the general manager of the office of the Arnold Company and its executive officer in charge of the office; that he, said Ralph G. Arnold, never was upon the site of the Mackay dam or the Big Lost River Irrigation project; that he is not an engineer and has at no time undertaken or assumed to pass

on any engineering question; that he at no time represented to C. B. Hurtt or William M. Wayman, or to any other person, that the work done by Corey Brothers Construction Company upon this Big Lost River Irrigation project was in accordance with the plans, specifications and contract between said Company and the Big Lost River Irrigation Company, and that the Arnold Company has at no time accepted the work done by said Corey Brothers Construction Company upon this project or issued a final certificate therefor.

That said W. H. Rosecrans states the facts to be and that he will testify that the last time he was either at the Mackay dam or upon any part of the irrigation system of said Big Lost River Irrigation Company was in September, 1909; that during the summer of 1910 he did not represent to C. B. Hurtt or to William M. Wayman, or any other person, that the work done upon the Big Lost River Irrigation project by Corey Brothers Construction Company was in accordance with the plans, [132] specifications and contract between said company and the Big Lost River Irrigation Company, and that the Arnold Company never, to the knowledge of said W. H. Rosecrans, accepted the work upon said project done by Corey Brothers Construction Company or issued the final certificate therefor, and that said W. H. Rosecrans severed his connection with the Arnold Company in the month of August, 1910.

Affiant further states that on this day he has had his first opportunity of conferring with Frank Coy since the receipt of said transcript; that said Coy

states the facts to be and states his willingness to testify that no men were discharged by him who were engaged in the work of driving sheet piling; that the only men employed by him for such work were a few so employed after said Coy had applied to Corey Brothers Construction Company for men for said work, and said Corey Brothers Construction Company had been unable or failed to get the necessary men; that said Coy before or about the time that the excavation was begun from the borrow-pits drove stakes all over the ground covered by all the borrow-pits, took the elevations of such stakes and preserved the same for future reference in order to know the amount of material excavated by the contractor; that in doing that work he marked all the ground out in squares of fifty feet (50'), and that the above were all the stakes driven in the vicinity of the borrow-pits by or under the supervision of said Coy.

Affiant further states that he has drafted affidavits for each of said three (3) parties to sign, which drafts are strictly in accordance with the statements of said persons, but that affiant was unable to get said affidavits written out in time to be sworn to by said parties to-day, and that the same [133] will be duly signed and sworn to on Monday, the 15th instant, and forwarded to Oliver O. Haga of Boise, Idaho.

Affiant further states that when the above testimony was offered by counsel for the complainant at the session above referred to, held in Boise, affiant duly objected to the offering of the testimony at that

time on the grounds,

First: That it was not proper rebuttal.

Second: That if intended as impeaching evidence, no foundation was laid by questioning the witnesses at the cross-examination.

AMOS C. MILLER. [134]

[Title of Court and Cause.]

[**Affidavit of Ralph G. Arnold.**]

Ralph G. Arnold being first duly sworn, states that during the whole of the year 1910 he was secretary, treasurer and acting general manager of the office of the Arnold Company, and its executive officer in charge of the office; that he, said affiant, never was upon the site of the Mackay dam or Big Lost River Irrigation project, and had no personal knowledge of the character of the work there done; that he is not an engineer and has at no time undertaken or assumed to pass on any engineering question; that he at no time represented to C. B. Hurtt or William M. Wayman or any other person that the work done by Corey Brothers Construction Company upon the Big Lost River Irrigation project was in accordance with the plans, specifications or contract between said company and the Big Lost River Irrigation Company, and that the Arnold Company has at no time accepted the work done by said Corey Brothers Construction Company upon this project or issued a final certificate therefor.

RALPH G. ARNOLD. [135]

[Title of Court and Cause.]

[Affidavit of Frank Coy.]

Frank Coy being first duly sworn states that while he was engineer upon the dam near Mackay, Idaho, of the Big Lost River Irrigation Company, he discharged no men engaged in any way in the driving of the sheet piling, and employed no men for that work except a few that he so employed after he had applied to the Corey Brothers Construction Company for such men, and the latter had either been unable to or failed to supply the necessary men;

That at or about the time the excavation work began from the borrow-pits at the Mackay dam affiant staked out all the ground in the vicinity of the borrow-pits, and owned by said irrigation company, dividing said ground into squares of fifty (50) feet and taking the levels of said stakes for the purpose of future reference to assist affiant in ascertaining the amount of material excavated from said pits, and that no other stakes were driven there by or under the supervision of affiant.

FRANK COY. [136]

[Title of Court and Cause.]

[Affidavit of W. H. Rosecrans.]

W. H. Rosecrans being first duly sworn states that the last time that he was ever either at the site of the Mackay dam near Mackay, Idaho, or upon any part of the irrigation system of the Big Lost River Irrigation Company was in September of 1909; that during the summer of 1910 affiant did not represent

to C. B. Hurt or William M. Wayman or to any other person that the work done upon the Big Lost River Irrigation project by Corey Brothers Construction Company was in accordance with the plans, specifications or contract between said company and the Big Lost River Irrigation Company, and that the Arnold Company never to the knowledge of affiant accepted the work upon said project done by Corey Brothers Construction Company or issued a final certificate therefor, and affiant severed his connection with the Arnold Company in the month of August, 1910.

W. H. ROSECRANS. [137]

[Title of Court and Cause.]

[Affidavit of Samuel Storrow.]

Samuel Storrow being first duly sworn states that he is the same Samuel Storrow who has heretofore testified in this case; that he has examined the map entitled: "Map showing relative location and elevations of spillway, test-pits, borrow-pits and water levels in reservoir and below dam, Mackay dam scale one inch to one hundred feet," signed by W. S. Collins, and purporting to have been made from surveys made on June 23d, 26th and 27th, 1912.

Affiant further states that the three test-pits described as follows on the above-mentioned Collins map: "Test-pit No. 1, 11.8 feet deep; test-pit No. 2, 21.5 feet deep; test-pit No. 3, 21 feet deep" were dug at his request and in his presence at the time of his visit to the Mackay dam as heretofore stated in his evidence; that at the time when these pits were completed the water surface in the reservoir of the

dam and the water surface in the state spillway and the water surface in the pool below the dam were all of them materially higher than as shown on the said Collins map, and that the test-pits above mentioned were dug until they reached about six inches into the underground water plane which extends from the [138] surface of the water in the reservoir to the surface of the water in the pool below the dam.

Affiant further states that he made measurements with a steel tape to show the fluctuation of water level at the bottoms of these several pits and also made similar measurements in other places where the surface of the underground water plane was exposed; that these measurements were made also by the engineers then on the ground and as the level of the water surface in the reservoir and in the spillway and in the pool below the dam gradually lowered, owing to the diminish of the Big Lost River, the surface of the underground water exposed in the pits also lowered in accordance therewith until the bottoms of the pits became dry at a time when the reservoir water surface had lowered about one foot, but when it was at a higher level than as shown in the above-mentioned Collins map.

Affiant further states that each of these three pits has partially filled up and are none of them now as deep as at the time when they were dug and measured under his supervision. Assuming that the water in the reservoir and in the state spillway and in the pool below the dam is at the several elevations shown on the Collins map, and that the bottoms of the three test-pits are at the elevations stated on that

map, affiant considers it impossible that water could be found at the bottoms of those test-pits at the elevations stated on the Collins map, because the test-pits were originally dug to just intersect the hydraulic gradient when said gradient was at a materially higher elevation at a time when the Big Lost River was at flood and that this hydraulic gradient slowly sank as the flow of the river diminished until said gradient sank below said test-pits, and that this experiment proved conclusively that the hydraulic gradient extending from the surface of the reservoir above the dam to the surface of the pool below the dam [139] measured along the line of the said test-pits fluctuated and continues to fluctuate with relatively minor variations of the water surfaces stated, and therefore, proves conclusively to him as an engineer, and he so states it to be a fact, that the composition of the material through which the test-pits were sunken and the composition of the material underlying them through which the water previously reached the said test-pits, is so open and porous as to permit the hydraulic gradient to sink very rapidly after leaving the surface of the reservoir.

Affiant further states that the pool on the right bank on top of the dam over the core-wall was carefully observed by affiant at the time of his visit. It was a running pool delivering a stream of water exceeding one second-foot, which water entered it coming through the fill between the pool and the reservoir and left the said pool by flowing over the top of the core-wall and thence sinking down into the

vs. Corey Bros. Construction Company et al. 153
body of the dam below the core-wall.

And further affiant saith not.

SAMUEL STORROW. [140]

[Letter, Dated July 1, 1912—W. S. Collins to Amos C. Miller.]

COPY.

July 1, 1912.

Mr. AMOS C. MILLER,
New York Life Bldg.,
Chicago, Ill.

Dear Sir:

In accordance with your request I returned to the Mackay dam and completed the survey of test-pits, spillway, borrow-pits, etc. I located the two additional pits near the core wall, one above and one below as shown in the photographs.

The water in the reservoir had risen two feet from Sunday noon to Wednesday afternoon, and about 25 sec. ft. was flowing through the spillway. A pool about 100 ft. long and 50 ft. wide had arisen in the dam due to seepage from either the reservoir or the spillway or possibly from both.

The accompanying map shows the relative location of the test-pits, spillway, borrow-pits, etc., and the relative elevation of the same and also of the water in the reservoir in the pool and below the spillway.

I trust this will give you the information desired and will be of service.

Yours very truly,

W. S. COLLINS. [141]

Map attached to this Stipulation omitted at request

of counsel for appellant, to be forwarded with original exhibits.

Stipulation approved.

July 23, 1912.

FRANK S. DIETRICH,

Judge.

[Endorsed] : Filed July 23, 1912. [142]

[**Testimony—Evidence.**]

This cause coming on for hearing the 5th day of April, 1912, before R. M. McCracken, Special Examiner, duly appointed by the Court to take and report the testimony, the following proceedings were had, to wit:

Plaintiff offered in evidence the following exhibits:

Plaintiff's Exhibits, No. 1 and No. 2, being segregation lists No. 8 and No. 18, segregating approximately 100,000 acres of land under Carey Act, substantially all of said lands being situated under the irrigation system described in plaintiff's complaint.

Exhibit No. 3, Water Permit No. 1570.

Exhibit No. 4, Water Permit No. 1513.

Exhibit No. 5, Water Permit 1748.

Exhibit No. 6, Water Permit 4061.

Exhibit No. 7, Water Permit 4062. [143]

Exhibit No. 8, Water Permit 4063.

Exhibit No. 9, Water Permit 4946.

Exhibit No. 10, Water Permit 4960.

Exhibit No. 11, Water Permit 4101.

Exhibits 12, 13, 15, 16 and 17 are deeds, assignments, and transfers from George S. Speer to Big

Lost River Irrigation Company of all water rights, water permits, rights of way, and contracts with the State of Idaho for the construction of irrigation works acquired or held by the said George S. Speer.

Exhibit No. 14, agreement with the State of Idaho and George S. Speer, dated May 27th, 1909, for the construction of what is known as the Big Lost River Project, said agreement being made under the Act of Congress, commonly known as the Carey Act, and the laws of the State of Idaho passed pursuant to said Act of Congress.

Exhibit No. 18, general map showing lands segregated and their situation relative to the irrigation works constructed by the Big Lost River Irrigation Company.

[**Testimony of Goyne Drummond, for Plaintiff.]**

GOYNE DRUMMOND, a witness called and sworn on behalf of plaintiff, testified as follows:

Direct Examination.

(By Mr. HENDERSON.)

I live at Riverton, Wyoming; my business is engineering and surveying. I was employed upon the Big Lost River Irrigation Company project, first as assistant engineer, then as engineer in charge; was in charge from July, 1909, to September, 1910. This system is in the counties of Blaine, Custer, Bingham, and Fremont. Corey Brothers Construction Company did the work thereon. I can locate some of the canals on Exhibit 18. The Corey Company constructed about 200 miles of canals; they also constructed the dam as far as completed. I first did

(Testimony of Goyne Drummond.)

a portion of the contour [144] work; located and cross-sectioned a portion of the Blaine canal and was then put in charge of the rest of the work. Rosecranz acted as chief engineer. I gave certificates to Corey Brothers. Exhibit No. 19 is an estimate for work up to July 31, 1910. I delivered that to Corey Brothers. I was working for the Arnold Construction Company and the Big Lost River Irrigation Company. When I made that estimate there was no other resident engineer. Exhibit No. 20 is a certificate for work during August, 1910, and all previous work from June, 1909. It was correct. Rashbocker gave Corey Brothers directions while I was there. He was the engineer in charge prior to the time I took charge. I gave Corey Brothers instructions as to where I wanted the work done, canals, laterals and dams. I was acquainted with the contract between Corey Brothers and Big Lost River Irrigation Company. I gave them all the instructions that were necessary to do the work, how I wanted certain materials placed in the canals, and what work on the canals and laterals I wanted first completed. Corey Bros. Construction Company followed the terms of this contract with Big Lost River Irrigation Company in doing that work. I graduated from the engineering department at the Ohio Northwestern University in 1883; have been an engineer continuously ever since. I went to work for the Arnold Company on this job in February, 1909. I was field engineer under Rashbocker who then had charge of the work; was afterwards under the supervision of the Arnold Company.

(Testimony of Goyne Drummond.)

The Big Lost River Irrigation Company owe me about \$500.

[Testimony of C. B. Hurtt, for Plaintiff.]

C. B. HURTT testified as follows:

I am president of the Big Lost River Irrigation Company, have been since the company's organization, June 16, 1909. [145]

Exhibit No. 21 was introduced on behalf of plaintiff, same being a certificate issued by the Secretary of State of the State of Idaho showing the incorporation of the Big Lost River Irrigation Company under the laws of the State of Idaho on the 15th day of June, 1909, and that said corporation was thereby authorized to do business in said State.

Exhibit No. 22 was also introduced, the same being a certified copy of the articles of incorporation of the Big Lost River Irrigation Company.

I was one of the incorporators of the Big Lost River Irrigation Company. A written contract was made between the Big Lost River Irrigation Company and Corey Brothers. It was dated July or August, 1909. Corey Brothers had done work on the project before that was signed.

Exhibit No. 23, contract between Corey Bros. Construction Company and the Big Lost River Irrigation Company.

This is a contract under which Corey Brothers did the work from that time on. Prior to the date of this contract we had an oral contract with Corey for doing this work. When Speer of the Trowbridge & Niver Company acquired the Big Lost River Irri-

(Testimony of C. B. Hurt.)

gation Company project Speer and Rosecranz were here and they sent for Corey. I was present, and we discussed the construction of the system. That was between May 1 and May 15, 1909. It was verbally agreed Corey should go ahead and construct an irrigation system and dam. The work commenced about the middle of June, 1909. W. H. Rosecranz was the chief engineer. Rashbocker was one of his assistants on the ground, resident engineer, and later Drummond; Drummond was the engineer on the ground. There was no contract in writing with him. The contract was with the Arnold Company, not with Drummond. Drummond was acting for the Big Lost River Company as engineer in charge of that work through [146] the Arnold Company. Rosecranz was the man in charge of the irrigation department of their business. The Big Lost River Irrigation Company recognized Drummond, Rosecranz and Rashbocker as the engineers in charge of the work while Corey Brothers were working. There were no other engineers representing the Big Lost River Irrigation Company.

When we were approaching the time when we had to arrange for cement, either Rosecranz or Speer asked Corey to make the best arrangement he could for the cement. That was the last of June or first of July, 1909. Corey did so. The bills were sent to the office. That is my signature as president of the Big Lost River Irrigation Company to this cement contract.

Cement contract offered in evidence as Exhibit

(Testimony of C. B. Hurtт.)

No. 24, dated September 18, 1909.

According to the best of my knowledge the Union Portland Cement Company furnished cement under this contract. Speer was vice-president of the Trowbridge & Niver Company. The latter was a bond-house in Chicago. They had the financing of the project. This is the minute-book of the Big Lost River Irrigation Company. I first became president according to the records July 16, 1909. From the time the company was incorporated it was generally understood I would be made president. Corey Brothers Construction Company partially constructed the dam and canal system. The dam is incomplete. They did all the work on it that was done. I was over the entire system while they were working. I cannot say what percentage of the canal system was done. The Big Lost River Irrigation Company had nobody else doing work on the dam or canal except Corey Bros. Construction Company, unless they were Corey's subcontractors. We had an executive committee of the Big Lost River Irrigation Company consisting of Clinton, Ruick and myself. This appears on page 56 of the minute-book. [147] The first board of directors were Clinton, Jr., Ruick, Oppenheim, Roos and myself. The board of directors were elected July 16, 1909. This appears on page 41 of the minute-book. In the fall of 1909 Ruick and Oppenheim resigned and Roos and Speer were elected. That was January 11, 1910. These persons afterwards acted as directors of the Big Lost River Irrigation Company. The Big Lost River Irri-

(Testimony of C. B. Hurt.)

gation Company is unable to pay its debts. It was in that condition in March, 1910, and ever since; it has been insolvent all that time. If a judgment should be obtained against the company the system should be sold as a whole.

Cross-examination.

(By Mr. BUDGE.)

Part of the segregations were made by the Big Lost River Land & Irrigation Company, which was a former company. The transfer was made to Speer in May and from him to the present company, about July 16, 1909. Speer had title about two months. He acquired the title from the Big Lost River Land & Irrigation Company.

[**Testimony of A. T. Corey, for Plaintiff.]**

A. T. COREY testified as follows:

I live at Ogden, Utah. I am a stockholder, vice-president, and secretary and treasurer of Corey Bros. Construction Company. In 1909 R. D. Roberts was secretary. I was upon the work of the Big Lost River Irrigation project during 1909 and 1910; was bookkeeper and paymaster for the Corey Bros. Construction Company, which company was the contractor. W. W. Corey was general manager and president. We started work in June, 1909, and quit work in August, 1910. I was practically on the ground, most of the time at the dam. (Here the witness is asked the names of the various subcontractors who did work on the project.)

I don't know whether there was written consent to [148] sublet by the Big Lost River Irrigation Com-

(Testimony of A. T. Corey.)

pany. \$1,394.55 is due to Molin & Kutler; due to Curd & Foss, \$5,687.86; to Molin Bros., \$1,933.63; to Frank Hess, \$7,234.05; to S. H. Walton, \$5,849.34; to F. S. Pinney, \$2,662.27; to Chamberlain Bros., \$4,823.98; to Hanson Bros., \$17,492.33. These various amounts include the 10 per cent.

Cross-examination.

(By Mr. HENDERSON.)

These amounts are given according to the estimates of the engineer of the Big Lost River Irrigation Company.

Cross-examination.

(By Mr. RUICK.)

I know these amounts only from the engineer's estimates; have no personal knowledge. These amounts are shown on the books of the Corey Bros. Construction Company. I don't know anything further about them. I had charge of the books; and Mr. Higinbotham a part of the time. He was book-keeper in the Ogden office. Drummond was the engineer in charge of the work most of the time. I don't know whether these engineers were in the employ of the Big Lost River Irrigation Company or of Arnold Company. The estimates on which the entries in the books are based are either here or in Ogden.

Redirect Examination.

Corey Bros. Construction Company accepted these estimates as being correct.

(Testimony of A. T. Corey.)

Recross-examination.

(By Mr. HENDERSON.)

They are correct as far as I know according to the estimate of the engineer. No other engineer gave estimates while Drummond was there in charge.

Recross-examination.

(By Mr. RUICK.)

All I know is that Drummond and Rashbocker were upon the work and furnished the estimates. The reason I know they were employed by the Big Lost River Irrigation Company was because [149] they were the only engineers in charge and gave us instructions as to how to do it and issued certificates for payment which were paid.

Cross-examination.

(By Mr. HAGA.)

I don't know of a single estimate having been paid on Drummond's own signature without the signature of other engineers; the chief engineer approved the estimates. I don't know of any of Drummond's estimates that were paid that were not approved; I don't know of any of his estimates that were changed before being paid.

[**Testimony of W. W. Corey, for Plaintiff.]**

W. W. COREY testified as follows:

(Examined by Mr. BUDGE.)

I am president and general manager of the Corey Bros. Construction Company for three years. The Big Lost River Irrigation Company project is in the counties of Custer, Blaine, Bingham and Fremont,

(Testimony of W. W. Corey.)

Idaho. The Corey Bros. Construction Company did the work. Began about June 15, 1909. Rashbocker was the engineer in charge at first; Drummond was his subordinate. Rashbocker left in July or August, then Drummond was in charge until August, 1910.

(Here the witness is questioned about subcontractors.)

Neither the Big Lost River Irrigation Company or its president ever stated to me who would furnish estimates on this project. Rashbocker was engineer in charge at first, and then Drummond. All the work by the subcontractors was by general supervision of them. Also the work of the Corey Bros. Construction Company. Hurtt, the president, told us we would take our orders from Rashbocker first and afterwards from Drummond. My company recognizes the estimates as given by the engineers of the subcontractors as correct; we think them to be. Their work was grading and building canals. Did no work on the dam. [150]

[**Testimony of Orson O. Corey, for Plaintiff.]**

ORSON O. COREY testified as follows:

I am a stockholder and director of the Corey Bros. Construction Company. I was upon the canal system constantly during 1909 and 1910. In charge of the work for the Corey Bros. Construction Company. Frank Hess, Molin, and Kutler, F. L. Pinney, Curd & Foss, Molin & Molin, S. H. Walton, Chamberlain Brothers and Hanson Brothers performed work on the project. Nearly all quit in August, 1910; Walton quit a little earlier. These men did work on the

(Testimony of Orson O. Corey.)

canals but were scattered along the country forty or fifty miles. The nearest one to the dam was Hess, about fifteen miles away. I had immediate charge of the work of these subcontractors. Drummond and Rashbocker directed me. They were the chief engineers. They had a lot of subordinates. They were the men we took our orders from.

(Here the witness states when the various subcontractors began work.)

Mr. Budge offers in evidence pleadings in the State court case.

Various claims for liens offered in evidence.

[**Testimony of C. B. Hurtt, for Plaintiff
(Recalled).]**

C. B. HURTT, being recalled, testified as follows:

This minute-book shows the by-laws of the Big Lost River Irrigation Company, offered in evidence as Exhibit 25, and sections 4 and 5 of Article IV, read as follows:

“Sec. 4. President. The President shall preside at all meetings of the Board of Directors and of the stockholders. Present at each regular meeting of the stockholders a report of the condition of the business of the company.

“Appoint and remove subject to the approval of the board of directors, all officers, agents, and employees and representatives of the company, other than the vice-president, secretary and treasurer, and fix their compensation.

“Make and sign all contracts and agreements on behalf of the company, and see that they are prop-

(Testimony of C. B. Hurt.)

erly carried out. [151]

“Do and perform all acts incident to the office of president, or which are authorized and required by him by the by-laws or the laws of the State of Idaho.

“Sec. 5. Duties of Directors. The Board of Directors shall have the control and general management of the affairs and business of the company. Adopt such rules and regulations for the conduct of their meetings and the management of their company as they may deem proper, not inconsistent with the laws of the State of Idaho, or these by-laws.”

The minutes of the meeting of the board of directors of the Big Lost River Irrigation Company, held on the 16th day of July, 1909, and found upon pages 55 and 56 of the minutes of said company, were offered in evidence as Plaintiff’s Exhibit No. 26.

The minutes of the meeting of the board of directors of the Big Lost River Irrigation Company, held on the 21st day of August, 1909, and found upon pages 59, 60 and 61 of the minutes of said company, were offered in evidence as Plaintiff’s Exhibit No. 27.

From June 15, 1909, to August 26, 1909, Corey Bros. Construction Company was working in the construction of the Big Lost River project for the Big Lost River Irrigation Company.

Exhibit No. 28, map of the Big Lost River Irrigation Company project by Arnold Company, offered in evidence with the file-mark of the State Engineer’s office.

Exhibit No. 29, another map of the system, offered in evidence.

[**Testimony of Goyne Drummond, for Plaintiff (Recalled).]**

GOYNE DRUMMOND, being recalled, testified as follows:

I located the site for the dam for the Big Lost River Irrigation Company early in March, 1909. The Corey Bros. Construction Company did all work they did on the ground I located for the dam. I was at the dam site every week or ten days; I was all over the works and canal system. Corey Bros. [152] constructed all of the work on the dam that was constructed, also on the canals and laterals. The canals and laterals are about 95 per cent completed.

Cross-examination.

(By Mr. MILLER.)

I surveyed the dam site early in March, 1909. Rashbocker was then my immediate superior. He spent probably a fourth of his time between February and July either on the canals or dam site. Rashbocker's headquarters were at Mackay. When I say he was on the ground only one-fourth of the time. I mean where I was. I worked from the Canadian to the Mexican line on canals and railroads and mining engineering and subdivisions, supervised dams for the Wyoming Development Company for the Wheat Land Irrigation project about 100 miles north from Cheyenne. That dam was made of cribbed rock; also several small reservoir dams. That crib

(Testimony of Goyne Drummond.)

rock dam was 10 feet wide by 125 feet long. Water face was loose rock and gravel. I supervised no other dams except a few small ones, probably 20 feet high, and very short for small irrigation reservoirs. These were open dams. There were two of them at Wheatland. The open dams northwest of the Wheat Land was 20 feet high and 200 feet long. That is all the dams I have supervised the construction of. The earth dam was gravel and loam. The water head was 4 feet at the top. There was no core; no puddling done.

In April, 1909, I familiarized myself with the contract, plans and specifications of the Mackay dam. They were all attached together. I don't know whether the Coreys' bid was attached, but the prices of material were in that contract, in the schedule of the various kinds of work. I took occasion to familiarize myself with the plans and specifications to enable me to see that the work was carried out in accordance therewith. I think the Corey Bros. Construction Company began work about the middle of June. Rosecranz [153] was chief engineer, as we understood it. So far as I personally knew he was present on the work twice. I presume the work began on June 10, 1909, as it states in the certificates. While the dam was in progress I was there every week or ten days. The balance of the time I was on the canals and laterals. Coy, my assistant, was located on the dam. He went there a short time before its construction began. The dam was begun some time in June, possibly before that. Coy was there

(Testimony of Goyne Drummond.)

two or three months after the construction began. This certificate states that the work began on June 1, 1909. So far as I know that is correct.

I presume I had a copy of Plaintiff's Exhibit 23, the contract between the Corey Bros. Construction Company and the Big Lost River Irrigation Company.

Defendant's Exhibit 1 is one of the maps referred to in the contract, or a copy of it; also Exhibit No. 2 and 3, and 4, and 5 and 6 and 7 and 8 and 9. All these were received from my employer, the Arnold Company, either before the work started or during its progress.

In July, August or September, 1910, I drew a salary from the Big Lost River Irrigation Company. That was for operating and maintaining the canals when we turned the water in. And the other work I did for the Big Lost River Irrigation Company was under the employment of the Arnold Engineering Company, whose employ I left in August, 1910. I left the Big Lost River Irrigation Company's employ in September, 1910.

On the plans and specifications the spillway was designed to be constructed as an open cut, but we built a tunnel for about 50 feet. There is no such tunnel shown on the blue-prints. It is shown as an open cut. When they began excavations the work was such that if we shot this portion of the material down it would weaken that portion of the dam and throw [154] the material on the core. That is why we drove the tunnel instead of making an open

(Testimony of Goyne Drummond.)

cut. It did not reduce the size of the spillway. The tunnel was 12 or 14 feet high. It did not reduce the capacity of the spillway in the least. The tunnel is just as good as an open cut if it has got the area that the open cut has; debris would not be any more likely to catch than in an open cut in that position. There is no more friction in a tunnel, no more liability to being stopped up. I supervised the construction of a tunnel for water at the Wyoming Development Company Wheat Land which I have mentioned. That tunnel was 7 by 8. Debris would not be any more likely to catch in the tunnel. We were afraid that by shooting out the rock it would damage the core-wall and shatter the solid rock forming the cliff and causing openings and obstructing the work below. It would shatter this mountain of rock. Then the rock falling near the core-wall would have to be removed again. It was cheaper to drive a tunnel than to carry all this mountain of rock away. We did use dynamite in driving the tunnel. We could not leave the broken rock near the core-wall. A portion of rock was put in the dam, in the southwest portion, below the core-wall. Some of this came within 20 feet of the core-wall. All of the loose rock excavated from the cliff was left in that place. There was clay in that rock that came from the crevices. There was only a little of this rock that was within 20 feet of the core-wall. That material was not called for in the specifications to be put in the dam. The specifications did not call for placing that material in the dam. It was contrary to the

(Testimony of Goyne Drummond.)

specifications so far as they go to put that class of material in the dam.

Defendant's Exhibit No. 10 (Bifurcation on Blaine Canal) is one of the drawings from which the work was constructed and [155] which we had during the construction. I don't know that the State Engineer condemned the piling of the rock within the dam; I don't remember that on December 29, 1910, the State Board of Land Commissioners entered an order ordering the removal of that rock.

Defendant's Exhibit 11 (Antelope Creek Crossing) is one of the drawings we had during the construction of the work and from which it was constructed. It came from the Arnold Company. I was last at the work in October, 1910. All the work that had been done had been done by the Corey Bros. Construction Company. The siphon and the weir and the Antelope Creek crossing were constructed according to the plan I had.

Photograph, Defendant's Exhibit 12, shows the construction of the Antelope crossing.

"Q. I will also ask you to look again on this map entitled exhibit 11, at another portion of it, the portion marked here, entitled Section BB. What does that indicate as to openings?

A. That indicates that there is two openings there.

Q. Two openings below the bed of the canal, the bottom of it?

A. Two openings—there is two openings, the openings, I think, into the canal, as near as I can

(Testimony of Goyne Drummond.)

tell from that.

Q. Openings into the canal? A. Yes, sir.

Q. Then what does it show above that—any openings? Answer as soon as you can, Mr. Witness, so that we can get along.

A. I will do that. Those show the openings into the canal.

Q. Yes, you are pointing now to the two openings? A. Yes, sir.

Q. Which we will mark A and B?

A. Yes, sir.

Q. And the last question I asked you was whether it showed four openings above that.

A. It does not. [156]

Q. You do not call those openings?

A. I wouldn't call those openings, no, sir.

Q. How then do you find the openings here below there, at A and B, what is there there to indicate openings at A and B?

A. Well, I would indicate by the manner in which that opening was placed there.

Q. Well, will you tell what there is here to indicate an opening at A and B and none at C, D, E, and F?

A. No, I can't see that there is anything there but what those are shown as openings in that right there.

Q. Well, then, you said a minute ago—

A. Had they been closed they would have been evidently marked as the concrete is marked.

Q. So that you wish to change your testimony

(Testimony of Goyne Drummond.)

given a minute ago in which you said it showed no openings at C, D, E, and F, don't you?

A. Yes, those are marked on that as openings, just looking at it that way as openings.

Q. There couldn't be any possible doubt about it in the mind of any civil engineer, could there?

A. That those are marked as openings?

Q. Yes. A. There might be.

Q. There might be with a crazy civil engineer?

A. I don't know.

Q. Any sane engineer, there wouldn't be any doubt about it, would there?

A. I don't know about that.

Q. You never saw one that would have any doubt about it?

A. I have seen them, but whether they would have any doubt I don't know.

Q. In other words, it is as plain as it could be made that they are openings.

A. It is shown as openings.

Q. Now, we have got down to it. Referring again to this Exhibit 12, being a photograph of the same structure, are there any openings there, at the places indicated?

A. I can't tell whether those are openings by that photograph or not. [157]

Q. Well, now, you are pointing now to the openings immediately above the water, aren't you?

A. Yes, sir.

Q. And a long distance from the top of the concrete structure, aren't you? A. Yes, sir."

(Testimony of Goyne Drummond.)

I cannot detect on the photograph any openings in these works at the place indicated on C, D, D, & S of Exhibit 11. As near as I can remember the openings were there, but they don't show now. I don't say it was changed. I have no reason to think they were changed.

We got orders from our chief engineer whenever any changes were necessary we could make them, that was verbally from Mr. Rosecranz. I might have ordered changes; I don't remember. I always gave my men under me verbal instructions. I cannot conceive of any reason for leaving out those openings in that structure. I know the structure was wrecked, but I understand it was because they turned the water in and had no one to operate it. I cannot see how the openings would have a tendency to prevent the wreck; there were no openings in the downstream side in the canal. In case of a flood in Antelope Creek, if there were none of those openings except two underneath the canal all the water would have to go through those two openings; if there were four openings above the water could go through them if we wanted to use it in the canal. We could allow it to go through there; that might help to save the structure in case of a heavy flood, six openings instead of two.

“Q. I show you a map heretofore identified as Defendants' Trustees Exhibit 6, entitled ‘Intake Controlling Works for Blaine Canal.’ Were those works constructed in accordance with this plan?

A. The gate, the structure for the setting of the

(Testimony of Goyne Drummond.)

gate into the canal, as near as I can remember, were put in according to this or a very similar drawing. [158]

Q. What was the difference?

A. I don't see—I can't tell any difference unless I had this and compared it with the one which I had."

The intake controlling works for the Blaine Canal differed from the plan in that the dam was 125 feet instead of 150 and the tainter gate was on the opposite side of the reservoir; that was just as good on the other side of the reservoir. With the nature of that stream you have no mud to contend with. The ice which collects where the water settled, if you put a gate there it would draw the water away from the head-gates. We wanted to draw the water away from the head-gates to prevent it freezing there. That was my idea. I submitted to the Arnold Company's engineer a sketch of the gate and was told to put it in accordingly. I don't know where the sketch is. It came back to me. I presume I left it with the Arnold Company's engineer, Mr. Binkley. I think it was approved by Farnsworth. The head-gates of the Darlington Canal were constructed adjacent to our head-gates, between them and the dam. It is not so shown on the plan. It was done with Darlington's consent.

The wall was built 10 feet in length and not 100 feet. I don't know what that hundred feet of high wall was intended for. I think Rosecranz, as near as I remember, gave verbal consent to that change,

(Testimony of Goyne Drummond.)

either gave it to me or to Rashbocker, and Rashbocker, gave it to me. It was all verbal. We didn't have to take our orders in writing from our superiors. I don't remember whether I gave any written orders from the Corey Bros. Construction Company. I don't remember anything about it.

I had under me Jones, Huff, Wiles, Brims, Thomas and Liverman.

Defendants' Exhibit 7, entitled "Details of Concrete Drops, Flumes and Canals," shows four columns of concrete at the head of the drops. In one of the drops there were two columns; [159] in the others they were omitted entirely. I don't think I gave the Corey Bros. Construction Company any written order to do that. Anyway, we got instructions from Rashbocker verbally to do that. Those were put in in 1909 and 1910. Rashbocker was on the job several times after he left in July, 1909. Whenever he was there he was my superior. I regarded Rashbocker as my superior whenever I had instructions from Rosecranz.

On Defendants' Exhibit 10, entitled "Plan of Canal and Bifurcation Works," the places marked A, B, C, D, and E are shown as openings. As near as I can remember they were so constructed. I don't remember as to that. This photograph of that structure shows concrete work up to within a very short distance of the top of the structure. I cannot say whether it shows very much less opening than is shown upon the blue-print; I don't think the reason

(Testimony of Goyne Drummond.)

for the wrecking of that structure was the inefficiency of the openings.

The ground on which the large dam rested was placed before filling in. I know that the Carey Act inspector objected that on portions of it that had been plowed they were going back and forth with teams and it was thoroughly packed again, and we did plow it, as near as I can remember, two or three times, that portion of it. I don't remember whether it was plowed once or twice. I don't know that a large portion was plowed at all. I don't think that the fill across the concrete wall was made partially by dumping from a trestle crossing the wall; it may have been, but I don't remember. There was one diagonal track crossing the core-wall; there might have been another one at another time.

Defendant's Exhibit 14 is a pretty good photograph as to how the dam looked in the course of construction. Not all of [160] this fill that is shown along the trestle nearest the front of the picture was made from that trestle; you couldn't tell from the picture. The line between the bottom and the fill is parallel with the top of the trestle. At the next place where the track crosses the core-wall, that shows it was dumped from the top of the trestle if the trestle was over the top of that. I don't think the third trestle crosses the core-wall. The specifications state the material should be dumped parallel with the core-wall. I think Rosecrans or Rashbocker gave permission to put the fill in this way; I don't remember; it was verbal. The space for dumping material in

(Testimony of Goyne Drummond.)

the dam was not sufficient to keep running right parallel with the core-wall until we came clear across, so this was constructed to within 20 feet of the top of the lift; then we gave them permission to cross this core-wall in order to come around to fill this on this side until they could get up to catch one of those other lifts. I gave Corey Brothers permission to cross the core-wall of the dam as they crossed from the diagonal track. Jones spoke to me about it and I told him to have them do that. I don't know whether Jones gave it to them in writing or not. I don't know whether Roberts, the Carey Act engineer, ordered it stopped. I asked him what his objection was and he said it was just as good, but was not according to specifications. I understood Roberts made a complaint to Mr. Martin; I understood that the specifications provided that all dumping should be toward the core-wall from a trestle on each toe so as to make it as nearly water tight as possible; but we sluiced in toward the dam. The effect of dumping without sluicing from the 25 foot trestle is that the coarser material will go to the bottom and the finer will stay on top.

Q. Then when you dumped from a diagonal trestle you got coarse material all the way up, didn't you?

A. No, sir. [161]

Sluicing down the diagonal fill will get same strata as if you are sluicing in from the outer toe; I know that the effect of it was that streams of water aggregating 50 second-feet went through the dam, but it

(Testimony of Goyne Drummond.)

is not so now; your experts are mistaken on that, all of them.

Defendants' Exhibit 15 is a photograph of the diversion works of the Blaine Canal.

I would not have admitted anything like that dumping from a 25 foot trestle at an angle of 45 degrees from the core-wall if it could in any way have been conveniently avoided; I might have told Mr. Roberts that in my opinion that was just as good; I don't know whether I told him it was cheaper, I might have. The contractor on the work was being paid by an estimate. Had my judgment told me that a little material going in there at that place and crossing there would weaken the structure I would not have put it in that way; I would have avoided it if conditions should have been such—in my opinion as an expert dumping from a trestle 25 feet high at an angle of 45 degrees to the core-wall would be very little different from the structure, according to the plans and specifications if properly sluiced, but if I were to have it done I would have it done parallel to the core-wall from the outside end, because I think it is a little bit better. It is better; there is no question about that; but the conditions were such I either had to stop him from work or else allow him to come in this way. I cannot see why dumping parallel with the core-wall and then sluicing in you would get a larger percentage of fines next to the wall than there was in the borrow-pit. Merely wetting that material from the borrow-pit would not make an impervious dam; it would be tighter when sluiced. When sluic-

(Testimony of Goyne Drummond.)

ing some of it slides down. [162]

My idea of sluicing is to make a compact mass. That would not be accomplished by dumping into water. I would prefer putting the trestle parallel to the core-wall rather than at right angles. Dumping from trestles parallel to the core-wall and then sluicing in towards the core-wall would get your finer materials next to the core-wall; they would be washed from above; there would be an excess of fines next to the core-wall and laying against it. I don't think you could sluice the material in for a distance of 200 feet; you could, but it would be a pretty hard proposition. I did some sluicing up in Wyoming. I did some sluicing in Wyoming by means of a box trough; sluiced in a thickness of a couple of feet. That is the only sluicing I ever did before this.

I think one of the borrow-pits was excavated within 100 feet of the dam and the other one I think was 200 feet. I don't think they were excavated within 20 feet of the embankment unless it was just to start laying the track.

The concrete used in the core-wall was made of gravel and sand, no clay. The gravel we used was all in there and dumped, gotten from a selection in the pit which they were careful not to have any clay stratum in. I never noticed that it was taken in differently from the dump in the fill. It was not screened, not all of it.

Q. Was that according to specification?

A. It was screened and tested.

(Testimony of Goyne Drummond.)

Q. Was that according to specification not to have it screened?

A. I think it was to a certain extent.

The gravel was apparently clean. It was all taken from the reservoir pit, but contained some stones larger than would pass through a 2½ inch ring. [163]

Q. Was that according to specifications?

A. Not especially. We could have screened it. I don't know whether all the concrete was tested for tensile strength. There were tests made. Jones was the man in charge of the dam. I don't remember what tests were made; Jones said he made tests.

I had no means of knowing whether the sheet piling was driven to bedrock; it was driven to refusal. The test I made was a kind of blue shale at various depths, from 10 feet to 30; the piling were 18 feet long and were spliced. I don't know how many were driven 30 feet. I didn't pay any attention to the number of piling driven. I couldn't say whether there was more than 113. They were 6-inch piling, a quarter or 3/8 of an inch thick. I saw piling driven 14 feet. Sometimes they struck boulders. Once I saw that.

Defendants' Exhibit 1 shows about 375 feet of sheet piling. From the end of the sheet piling we constructed a core-wall 6 to 8 feet below the original surface of the ground; that probably extended four or five hundred feet. This plan shows it went in nearly 900 feet. The core-wall did not go down to impervious material. I don't remember whether

(Testimony of Goyne Drummond.)

that is in accordance with the plans and specifications. I don't remember whether I got any instructions not to put the wall down to impervious material. The borrow-pits were excavated about a depth of 20 feet or more. We struck small strata of clay or sediment in various places in the borrow-pits. The core-wall was bonded to the impervious material next to the tunnel or the bluff but not on the other end. To the left of the end of the core-wall we dug a trench 6 to 8 feet deep. That was not bonded to impervious material. I think that was filled with other materials than that from the borrow-pits. I cannot remember whether we got any [164] other material or where we got it from. I think it was sandy loam from the other side of the creek. I don't remember how it was filled or whether it was puddled or whether horses were driven upon it.

Q. But still you have no hesitation in saying that everything was done in accordance with the specifications?

A. Well, now, then, the men whom I had under me I had confidence in while I didn't see this; also a certain amount of confidence in the contractors as I have in most any man, and when I tested that everything was done in accordance with specifications, I am basing my statement partly on the confidence I had in my subordinates.

I think there was a small stratum of clay in the lower borrow-pit, the one next to the reservoir; I am not sure of that. The material with which the trench was back filled was very similar to the borrow-pit material.

(Testimony of Goyne Drummond.)

We put reinforced concrete facing on the upper face of the dam. That was by agreement while Rachbocker was there. I know of no written order. That was better than the riprap. The concrete facing 4 inches thick would not necessarily break up. I have seen concrete 8 inches thick on the bottom of a reservoir bed which pressure had raised up about 3 feet and yet it did not crack. The bottom of the reservoir was 200 by 150 feet; the pressure of the water raised the concrete.

I don't know that the bonding of the joints in the core-wall was badly done; I don't know that it cracked so it leaked badly. Work on the dam was stopped by me in August, 1910, on Judge Ruick's orders. I don't know that the State gave orders to stop it; I heard they did, but I have no means of knowing.

When I left the employ of the Big Lost River Irrigation Company I did not take note-books with me; I received a letter [165] from Mr. Storrow that he wanted the stream measurements which were taken. I had a copy of them, but I made no reply to him; I don't know for whom it was being asked, or for what. I had taken a copy for my own information so that I might compare the sinking of that stream with other streams.

Probably two-thirds of the dam was constructed on the cone of Cedar Creek; that was a deposit from Cedar Creek. The waters from the creek sunk into the cone mostly except in extremely high waters. I don't think the material from which the core-wall

(Testimony of Goyne Drummond.)

was made was taken from the upper slope of the dam within 40 feet of the core-wall.

There was probably 5 or 6 second feet of water coming through the core-wall. Mr. Lippincot probably had as good a right to his opinion as I to mine when he said 20 feet. I don't think that Ford, Bacon and Davis are correct in saying that 50 second-feet were coming through. That is a difference in judgment. I don't think the concrete core-wall was being made of earth fill including clay. There was a little water seeping through the core-wall, but not enough to speak of. Not to my knowledge was there a difference of 10 feet in the depth to which two adjacent steel pilings were driven. I think there were 200 feet of sheet piling driven, at least 75 feet or over. When Roberts was there, I don't think that 50 second-feet of water was going through; I didn't measure them. My judgment and the judgment of all of those engineers that there was as much as 50 second-feet going through differed just that much. Over near the cliff Mr. Martin gave me permission to run the core-wall down to the rock instead of using the sheet piling. That was probably 20 feet from the cliff. We ran the core-wall to the rock probably 15 feet.

I don't know the capacity of the pump with which we did the sluicing. [166]

Referring to photograph, Exhibit 16, I think that shows the puddling has been done so as to make it fairly impervious. I cannot tell from photograph, Defendants' Exhibit 18, whether the puddling has

(Testimony of Goyne Drummond.)

it was above the head-gate. The head-gate is about fifteen miles below the reservoir. The reservoir could be used in connection with a part of the canals without the balance; couldn't use the canals much without the reservoir.

Redirect Examination.

Looking at Defendants' Exhibit 14, I should judge about 1000 yards of gravel were dumped diagonally. The rest was dumped from the track where it was curved and parallel. I know Rachbocker's [168] signature. This is it, Plaintiff's Exhibit No. 30. It reads as follows:

Plaintiff's Exhibit No. 30.

"Mackay, Idaho, 6-7-09.

Corey Brothers Construction Company,
Mackay, Idaho.

Gentlemen: Conditions being such that same can be carried out by contractors without additional expense or any delay in work, authority being given engineer to determine same, you are hereby notified that all spoil from tunnel approaches, tunnel bore and spillway excavation, must be deposited within slope stakes of Mackay reservoir dam.

Sincerely yours,
H. B. RASCHBACHER,
Engr., THE ARNOLD COMPANY."

It is stipulated that the residence of defendant Nephi Hansen and Ephriam Hansen, copartners, under the firm name and style of Hansen Brothers, K. L. Molen and R. E. Kutler, copartners, under the firm name and style of Molen & Kutler, J. W. Curd

and N. Foss, copartners under the firm name and style of Curd & Foss, K. L. Molen and Jesse Molen, copartners under the firm name and style of Molen & Molen, David Chamberlain and Thomas Chamberlain, copartners under the firm name and style of Chamberlain Brothers, Frank Hess, F. L. Pinney, S. H. Walton, are each and all residents and citizens as alleged in the complaint in this case, and that the defendant William Mooney was and is a citizen and resident of the State of Wyoming.

[**Testimony of W. W. Corey, for Plaintiff
(Recalled).]**

W. W. COREY, being recalled, testified as follows:

Plaintiff's Exhibit 31, copy of articles of incorporation of the Corey Bros. Construction Company, certified to by Secretary of State of the State of Idaho.

Plaintiff's Exhibit 32, certificate of the Secretary of State of Idaho to the Corey Bros. Construction Company, permitting it to do business.

Plaintiff's Exhibit 33, copy of articles of incorporation [169] of the Corey Bros. Construction Company, certified by the Recorder of Custer County, showing that said articles were filed in his office on the 20th day of July, 1909.

Plaintiff's Exhibit 34, copy of designation of agent by the Corey Bros. Construction Company.

Mr. HENDERSON.—Q. Is that your signature? (Showing witness paper.) A. Yes, sir.

Q. Would you swear to that? A. Yes, sir.

Said document was thereupon marked Plaintiff's Exhibit No. 35.

(Testimony of W. W. Corey.)

Q. Did you have this lien filed in any of the counties of Idaho? A. Yes, sir.

Q. Where?

A. Custer, Fremont, Blaine, Bingham.

Mr. HENDERSON.—I offer this in evidence, No. 35.

Mr. POWELL.—That is objected to as incompetent, irrelevant and immaterial, for the reason that it does not appear to be a statement of a lien as contemplated by the statutes of the State of Idaho, and is not in the name of the plaintiff in this case, and for all the reasons given heretofore in the offer of the certified copy of the articles of incorporation of "Corey Bros. Construction Co.," it appearing that the instrument is signed by Corey Bros. Construction Co., and not by the plaintiff in this suit, and not by the usual manner in which the plaintiff corporation signs its name, and not in the name of the corporation itself.

Mr. HENDERSON.—Now, gentlemen, that seems to be only filed, that one in the county of—

Mr. POWELL.—Are you offering the filing marks, Judge? [170]

Mr. HENDERSON.—And the filing marks there, and this is in the county of Bingham. Now, I have certified copies of mechanics' liens as filed in the courts in the counties of Blaine, Custer, Bingham and Fremont.

Mr. POWELL.—May we not shorten the record Judge, by agreeing that similar copies were filed at—state when they were filed.

(Testimony of W. W. Corey.)

Mr. HENDERSON.—I will introduce one certified copy and then—I will introduce the one that is filed in Custer County. Here is a certified copy of it.

Said document was thereupon marked Plaintiff's Exhibit No. 36.

Mr. POWELL.—That is objected to for the same reasons as given for Exhibit 35, just above referred to and offered.

Mr. HENDERSON.—It is stipulated that identical notice of lien was filed with the County Recorder of Blaine County on August 20, 1910, and duly recorded in Book 5 of Liens, commencing at page 408; and identical notice was also filed with the County Recorder of Bingham County on the 25th day of August, 1910, and was recorded in Book No. 3 of book of liens; also an identical copy of this lien was filed with the County Recorder of Fremont County on the 23d of August, 1910, and was recorded in Book A of Liens, commencing at page 488 to 499, inclusive.

Mr. POWELL.—While it is admitted that such filings were made, they are all objected to for the same reasons as given to the offer of Exhibit 35.

Mr. HENDERSON.—Q. Mr. Corey, I show you Plaintiff's Exhibit No. 23. Is that your signature?

A. Yes, I signed this. I didn't sign that part.

Q. I am asking if that is your signature?

A. Yes. [171]

Q. Did you sign as president of the Corey Bros. Construction Company? A. I did.

Mr. RUICK.—What does that purport to be, that paper you have?

(Testimony of W. W. Corey.)

Mr. HENDERSON.—The contract entered into between the Big Lost River Irrigation Company and Corey Bros. Construction Company.

Q. I notice on the seal mark here in the rim, "Corey Bros. Con. Co., Incorporated." Is that the way your seal is?

Mr. POWELL.—That is objected to as not being the best evidence. The articles of incorporation describing the seal would be the best evidence.

A. Yes, sir.

Before that contract between the Corey Bros. Construction Company and the Big Lost River Irrigation Company was signed, I was in Boise, after April and in May, 1909; I talked with C. B. Hurtt, Rosecranz, George S. Speer and James Clinton; they wanted me to give them prices for what I would build an irrigation system for the Big Lost River Irrigation Company for; I gave them my prices.

They wanted me to build the whole system. We agreed on prices. About June 15th we commenced moving on. Before I went to work I had a further talk about a contract. I wanted a contract and they were not quite ready. They told me they had taken over some property, there was going to be a reorganization of the company. Before I went to work I received a copy of the proposed contract. Plaintiff's Exhibit 37 is it. It is identical with the one that was signed. Merely the date and the signatures left out in the copy. The typewritten signatures of this Construction Company and Big Lost River Irrigation Company were on when I got [172] that

(Testimony of W. W. Corey.)

copy. There was no change whatsoever in the contract that I was working under from June 15 to August 26, 1909, from which we worked under after August 26, 1909. (Exhibit 37 is identical with Plaintiff's Exhibit 23, except that No. 37 does not contain the signatures.)

We worked from the middle of June, 1909, to the middle of August, 1910, then stopped for the lack of funds. The Big Lost River Irrigation Company had failed to pay me. The president told me they had no funds. We did nearly half the work on the dam and over 90 per cent on the canal. The engineer in charge in the field when we started was H. G. Raschbacher. He was succeeded by Goyne Drummond. We received instructions from them. We did the work according to the contract, plans and specifications, and under the direction of the engineers in charge of the work. I received Plaintiff's Exhibit 38 from the Arnold Company, who were the engineers in charge for the Big Lost River Irrigation Company. It covers the work from the time we started until we finished. Rosecranz was chief engineer of the Big Lost River Irrigation Company. Plaintiff's Exhibit 39 contains all the work we did on Mackay dam, including March, 1910. Exhibit 41 is a certificate of material furnished on the canal. Received it from the Arnold people. There is due now about \$525,000 with interest. Exhibit 40 is for material furnished from June 1st, 1909, to June 30, 1910. We quit work about August 15, 1910.

(Testimony of W. W. Corey.)

Cross-examination.

(By Mr. MILLER.)

Exhibit 37 is in the identical form when given them. The typewritten signatures were on there, the construction company by _____, President. Attest _____ Secretary; Big Lost River Irrigation Company by _____, President. Attest _____, Secretary. I have had that [173] since I received it. We went to work June 15th or a few days later. These prices on this proposal sheet marked with a Roman five were in at the time I got this copy. They are the prices we agreed on. I had already given Rosecranz my prices, called them off to him and he put them down. And from that he doubtless put the prices in the contract. I found the prices correct in the contract. We got this document, Exhibit 37, a little before we started to work—about the first of June. From that time on I was on the work most of the time but was in Boise a few times, also in Ogden a few times. Whenever I was in Boise I think I always saw Mr. Hurtt. Within the two months following June 15, 1909, I was in Boise two or three times. On those occasions I talked with Mr. Hurtt about the work. I was here on August 26, 1909, and was here at Boise two or three times between June 16 and August 26, 1909. Before I got this contract I told them I would go on and do the work. When I got this copy of the contract just before going to work I looked over the copy and found it satisfactory, and before I went to the work I think I told them it was satisfactory. When

(Testimony of W. W. Corey.)

we agreed on the prices and the terms of the contract there were present Hurt, Rosecranz, Speer, Clinton and myself.

I don't know whether the State Engineer told us to stop work before we did. I was in Chicago at the time. My son wired me. Hadn't been at the scene of the operations for a month or more. Whether the work was stopped by the State I personally do not know. We got an order from the engineer in charge to stop work. When I say work was stopped by reason of the lack of funds, I mean that would have been one good reason. I don't know whether the work on the dam was stopped by the State or not. When we had this conference they told me the Arnold Company would have charge of the engineering and Rosecranz would [174] be the chief engineer of the Big Lost River project. I was general superintendent with headquarters at Mackay. Orson Corey superintended the graders. W. E. Corey had charge of the dam and Archie Corey was the bookkeeper.

I spent my time on the work all the time. I familiarized myself with the terms of the contract and specifications as to the manner in which the work should be done, before I went to work. The amount due me is shown in the estimates.

That includes 10 per cent retained from the time the work was started. We received various payments on the estimates. Our January, 1910, estimate was never paid. Up to that time they were all paid under this contract. We got money directly

(Testimony of W. W. Corey.)

from the Big Lost River Irrigation Company in June, 1910, I think. I don't know on which estimate that was. That was the first we got directly from the Big Lost River Irrigation Company. The money we got in June, 1910, is the first that did not come from Chicago. All that came from Chicago came from Trowbridge & Niver Company. It is not true that they paid us in April, 1910, for all due up to that time. I suppose I received this telegram reading: "Checks mailed to-day, balance for your estimates as furnished by Arnold." Signed by Trowbridge & Niver Company. The January, 1910, estimate has never been paid. I suppose they paid the balance of the March estimate. Each estimate that we got included on its face all prior estimates and gave the balance due. The March estimate did not include all the moneys due. They sent me some notes, but I would not accept them. I sent them back. I put one in the bank for collection, but they could not collect—not as collateral—put that in as credit for the Big Lost River. That was a three or four months note. The other is about a sixty day note. Our bank account was not credited with that note. We held the note until it was about due, and then banked it for collection. Did [175] not bank the other note. Those notes were signed by Trowbridge & Niver Company. Those notes would have been enough to pay the January estimate. We never credited those notes to the account of the Big Lost River Project as requested.

Defendants' Exhibit No. 20 is the letter which we

(Testimony of W. W. Corey.)

wrote Trowbridge & Niver Company regarding these notes.

I couldn't say what was the retained 10 per cent, how much that amounts to for all the money that was paid was paid on these estimates and was all paid under this one contract. It all came from Trowbridge & Niver Company up to June, 1910.

This letter signed by somebody connected with the Arnold Company directing the piling of the excavated rock within the lines of the dam does not conflict with the contract plans and specifications. The Corey Bros. Construction Company has no letters or writings authorizing it in any way to vary in the construction work from the plans, contract and specifications, and never did have so far as I know.

When this contract was agreed upon Speer and Rosecranz were present. It was talked that we were to be paid on monthly estimates. There was no talk on the point of where the money was to come from. I supposed, of course, it would be paid by the Big Lost River Irrigation Company. There was no talk about where they were to get the money.

I think there was no talk between me and Hurtt or between me and Rosecranz and Speer as to where the money was to come from. Nothing was said about a bond issue. The first I ever heard about bonds or collateral was as I remember March 14, when they sent me those notes. That is the first I ever heard of it. Prior to this I knew nothing about a bond issue.

I have been in the contracting business since 1881,

(Testimony of W. W. Corey.)

As a rule I look into the credit of the concern from whom I take [176] a contract for a large amount of money. In this instance I looked up Trowbridge & Niver somewhat, and I knew Mr. Clinton and Mr. Hurtt. I knew Clinton and Hurtt would not be personally responsible for the debt. The reason I looked up their standing was that they wouldn't undertake something that they couldn't pay for. Speer did not say Trowbridge & Niver would guarantee the payment. In looking up Trowbridge & Niver I did not expect they would see the work was paid for. I looked them up to see what kind of people I was dealing with, as Speer was vice-president. I think I sent a telegram dated Ogden, May 16, 1910, addressed to George F. Speer, and signed by W. W. Corey. I think the telegram is true. I guess I would have to correct that telegram because we didn't discount the note.

Letter from Corey Bros. Construction Company to George F. Speer dated October 13, 1909, saying that "We succeeded to-day in getting the Union Portland Cement Company to sign the contract, and have mailed the same to Mr. Hurtt at Boise." We deposited the note in the Utah National Bank of Ogden, put it there for collection. We haven't a bank-book. My business is railroad contracting principally. Pat Daley was my foreman. He has been with us off and on for two or three years. He was a kind of general superintendent under my son.

When we deposited notes for collection we didn't draw against them. We kept that note in our vault

(Testimony of W. W. Corey.)

until we put it in the bank for collection. Put it in the bank perhaps a month before it was due. Didn't put it up as collateral security for a loan. Didn't borrow anything on it. Couldn't have gotten six bits on it. Pat Daley was foreman of the Mackay dam. I constructed one dam in Canada before this. That was the only one of any magnitude. That was about half a mile long and 40 feet high. A dam for a reservoir for irrigation. It was near Calgary. [177] That was for a 30-foot head of water. Had no core-wall. It was made of heavy soil, clay or loam. Built with scrapers and dump wagons. Did not use any railroad track. Didn't puddle or pack except by teams. I have built little small dams here and there, damming a river to turn the channel in railroad construction. Six dams in Idaho on Bear River. Put in six or eight miles to change the stream. Those dams were earth and gravel, 10 or 12 feet high, 100 to 150 feet long, made with scrapers.

Redirect Examination.

(By Mr. HENDERSON.)

Bear River carries about a thousand second-feet when it is normal. Two or three times as large as the Big Lost River.

I was to have these works completed by May 1, 1910. There were two reasons why we did not. First, the company would not comply with their contract in furnishing materials. Second, they did not pay me.

Letter from Corey Bros. Construction Company, to Trowbridge & Niver Company of October 5th,

(Testimony of W. W. Corey.)

about draft for sheet piling offered in evidence, and reads as follows:

“Mackay, Idaho, October 5, 1909.

The Trowbridge & Niver Company,

Chicago, Ill.

Gentlemen :

Some days ago we drew on you for payment of three cars of steel sheet piling which was shipped to us at Mackay, Idaho, with sight draft attached to the B/L, and our Ogden office advise us that you suggest that we have these matters O. Kd by Mr. Speer or the Arnold Company, before drawing on you in the future, and in reply we will say that it is no part of our contract to pay for this piling, or any other structural steel or cement to be used in the construction of the Big Lost River Project, as our contract calls for this material to be delivered to us F. O. B. the nearest R. R. station to the work.”

Recross-examination.

The company failed to furnish structural steel for the [178] outlet of the tunnel, controlling work. They were also delayed in their sheet steel piling. The outlet of the tunnel was completed before May 1, 1910. The sheet steel piling arrived in the fall of 1909, but they were not driven in time. It froze up and we couldn't haul material to the dam. We called for the piling the 10th of July, it came the middle of October. The work was not stopped before May 1st on account of these nonpayments, but we were delayed as we didn't work as fast as if we had more funds. We didn't put on the force we

(Testimony of W. W. Corey.)

would have put on. The work on the dam was delayed on account of the absence of that piling. We were working about 100 men down at the close of the work. The work on the dam was finished pretty close, I think, except one lift before putting in the piling. We couldn't put that in without the piling. Some of the work on the canal was delayed by the absence of the steel.

Redirect Examination.

I think we received letters from some of the engineers directing us to make changes from the specifications. I mean we didn't do any work only what the engineers directed. I received other letters besides the one that has been introduced.

Recross-examination.

(By Mr. MILLER.)

I may have some of those letters here. They may be in the office, I don't know. I may not have them all. I didn't see all of them. I was pretty particular to get my instructions. I say, there may be some other letters besides the one offered.

I don't know of any other letters authorizing changes from the specifications except the one about the excavation from the rock being put into the dam, and the ones concerning the reinforcing of the tunnel. So far as I know these letters are the only ones received. So far as my recollection is now those two [179] letters are all that we ever had. I don't recall any others.

[**Testimony of D. Worth Clark, for Plaintiff.]**

D. WORTH CLARK testified as follows:

That \$30,000 was reasonable attorneys' fees for plaintiff.

[**Testimony of A. T. Corey, for Plaintiff.]**

A. T. COREY, a witness for plaintiff, testified :

I am vice-president, secretary-treasurer, director of the Corey Bros. Construction Company. I was the bookkeeper at the time of this work. Exhibits 19 and 20 were received from Goyne Drummond, the engineer in charge of the work. Exhibits 38 to 41 inclusive were received from the Arnold Engineering Company of Chicago. These certificates show the full amount of the work done by Corey Bros. Construction Company. Exhibit 42 is the estimate of work done on the Mackay Reservoir Dam from the beginning to June 30, 1909, by the Corey Bros. Construction Company. Exhibit 43 is an estimate for the work done on the canal up to June 30, 1909. Didn't receive any certificate for materials furnished in June. Force account is included in estimates for excavation.

Here witness identifies exhibits from 42 to 47. Corey Bros. Construction Company has received \$691,119.48.

(Here follows the list of payments received.)

The last payment, \$3,000, was from the Big Lost River Irrigation Company direct. All the rest were from Trowbridge & Niver Company. Amount still due Corey Bros. Construction Company is \$522,-884.03, which does not include amount due to Union Portland Cement Company.

[Testimony of W. W. Corey, for Plaintiff
(Recalled).]

W. W. COREY, being recalled, testified:

It is my signature on Exhibit 35. [180]

When the contract, Exhibit 23, was delivered to us we had plans and specifications. Not all the blue-prints were delivered to me when we signed the contract. They were delivered in June, 1909.

Recross-examination.

The blue-prints that we had along before August 26th, were those identified by Drummond. We got those June 1st. Got them for the whole works. I knew when I went to work that this was a Carey Act project. I understood the contract was between the State and the Big Lost River Irrigation Company. I had no conference with the State Engineer. Speer did not tell me, that I recollect, that he had a contract with the State. I always understood it was between the Big Lost River Irrigation Company and the State.

Redirect Examination.

When I swore to this mechanic's lien claim I did not have the estimate for August, 1910. [181]

Recross-examination of W. W. COREY.

(By Mr. MILLER.)

When we filed the lien we did not have the final estimate. I do not recollect whether we had the one which has been identified here in evidence marked Plaintiff's Exhibit No. 19 and 20 and signed by Goyne Drummond only. We took the general account, everything that was due us, including the

(Testimony of W. W. Corey.)

cement for which estimates had been furnished us by the Union Portland Cement Company.

[**Testimony of A. T. Corey, for Plaintiff.]**

Direct Examination of A. T. COREY.

(By Mr. HENDERSON.)

I made up the figures for the mechanic's lien. I think the claim of the Union Portland Cement Co. was taken off the amount, as I remember it now. As I remember we deducted \$13,774.56 from the estimates furnished, but we only had estimates covering work done and material furnished to July 31, 1910, and we made an approximate estimate of the work we thought about what it would amount to for August up to the time of filing this lien. We were merely the agent of the Union Portland Cement Co. When the Big Lost River Irrigation Co. paid us for cement we paid the Portland Co. for the cement which they furnished, but the cement which the Portland Co. furnished and for which the Big Lost River Irrigation Co. did not pay us I did not include in the lien. [182]

Cross-examination of A. T. COREY.

(By Mr. POWELL and Mr. HENDERSON.)

The moneys paid to us by the Big Lost River Irrigation Co. on account of cement were never separated. In making my statement yesterday as to the amount that is now due I made use of the figures as found in Exhibits 38, 39, 40 and 41, and those totals went to make up the totals of the work and material from which I reached my conclusions as to the amount that is now due after crediting the

(Testimony of A. T. Corey.)

amounts of the payments and deducting the cement company's bill and the \$13,000 odd of the cement. There was some cement included in the claim for \$41,149.79 for material, but the balance due the Portland Co. that they filed a lien for we deducted from the amount of the certificate that had been rendered us.

[**Testimony of Frank D. Higginbotham, for Plaintiff.]**

Direct Examination of FRANK D. HIGGINBOTHAM.

(By Mr. HENDERSON.)

I was in the employ of the Corey Bros. Construction Co. as bookkeeper all of the year 1909 and part of 1910. I quit on the 25th of July, 1910. On September 13, 1909, I made the first deposit of \$85,991.37 paid on account of the Big Lost River Irrigation Co. for work done by Corey Bros. Construction Co. for the Irrigation Co.; on October 14th, 1909, \$75,000; on October 25, \$57,292.82; on November 15th, 1909, \$136,879.02; on December 14th, 1909, \$155,329.85; in 1910, January 15th, \$39,306.04; on April 13th, \$39,489.80; on May 13th, \$5,000; on May 17th, \$375.00. I received all the payments made except three. Including the three payments testified to yesterday, \$691,119.48 has been paid. [183]

[**Testimony of Osborne B. Gilson, for Plaintiff.]**

Direct Examination of OSBORNE B. GILSON.
(By Mr. HENDERSON.)

I have lived in Ogden for about fifteen years. I

(Testimony of Osborne B. Gilson.)

have been manager of the Union Portland Cement Co. for five years.

A certified copy of the articles of incorporation of the Union Portland Cement Co. and also a certified copy of designation of agent of the Union Portland Cement Co. as certified to by the Secretary of State of Idaho, were then offered in evidence, marked Plaintiff's Exhibit No. 48, over objection of Mr. Haga.

Certificate issued by the Secretary of State of the State of Idaho authorizing the Union Portland Cement Co. to do business in the State of Idaho and certifying that the Cement Co. has duly filed its articles was thereupon offered in evidence and marked Plaintiff's Exhibit No. 49 over objection of Mr. Haga, such certificate being dated August 3, 1908.

Certified copy of the articles of incorporation of the Union Portland Cement Co. by the Recorder of Ada County, Idaho, was then offered in evidence and marked Plaintiff's Exhibit No. 50, over objection of Mr. Haga.

Certified copy of designation of agent and acceptance of provisions of the Constitution of the State of Idaho by the Portland Co. filed with the Recorder of Ada County, Idaho, was then offered in evidence and marked Plaintiff's Exhibit 51 over objection of Mr. Haga.

I am acquainted with the signature of Mr. James Pingree; he was secretary of the Union Portland Cement Co. on the 9th day of August, 1910, and signed the claim of lien for and on behalf of the

(Testimony of Osborne B. Gilson.)

Union Portland Cement Co.

Claim of lien filed by the Portland Cement Co. in the County Recorder's office of Fremont County was then offered in evidence and marked Plaintiff's Exhibit No. 52, over objection of Mr. Haga. [184]

Mr. Pingree, as secretary, signed and swore to the notice of intention to hold and claim a lien of the Union Portland Cement Company.

Claim of the Union Portland Cement Company against the Big Lost River Irrigation Co. notice of intention to hold and claim a lien, filed in the County Recorder's office of Bingham County, Idaho, were then offered in evidence and marked Plaintiff's Exhibit No. 53 over the objection of Mr. Haga.

Notice of intention on behalf of the Union Portland Cement Co. to hold and claim a lien against the Big Lost River Irrigation Co. filed in the County Recorder's office in the County of Blaine, Idaho, signed and sworn to by Mr. Pingree as secretary, was then offered in evidence and marked Plaintiff's Exhibit No. 54 over the objection of Mr. Haga.

Claim of lien of the Union Portland Cement Co. against the Big Lost River Irrigation Co. filed in the Recorder's office of Custer County, Idaho, signed and sworn to by Mr. Pingree as secretary, was then offered in evidence and marked Plaintiff's Exhibit No. 55 over objection of Mr. Haga.

Certified copy of notice of intention to hold and claim a lien, by the Union Portland Cement Co. against the Big Lost River Irrigation Co. filed in the records of Fremont County, Idaho, was then

(Testimony of Osborne B. Gilson.)

offered in evidence and marked Plaintiff's Exhibit No. 56 over the objection of Mr. Haga.

Certified copy of notice of intention to hold and claim a lien of the Union Portland Cement Co. against the Big Lost River Irrigation Co. filed in the County Recorder's office of Custer County, Idaho, was then offered in evidence and marked Plaintiff's Exhibit No. 57 over objection of Mr. Haga.

Certified copy of the notice of intention to hold and claim a lien of the Union Portland Cement Co. against the Big Lost River Irrigation Co. filed in the County Recorder's office of Bingham County, Idaho, was then offered in evidence [185] and marked Plaintiff's Exhibit No. 58 over objection of Mr. Haga.

Certified copy of notice of intention to hold and claim a lien of the Union Portland Cement Co. against the Big Lost River Irrigation Co. filed in County Recorder's office of Blaine County, Idaho, was then offered in evidence and marked Plaintiff's Exhibit No. 59 over objection of Mr. Haga.

The Union Portland Cement Co. furnished cement to the Big Lost River Irrigation Co. during the years 1909 and 1910. About the first part of August, 1909, Mr. W. W. Corey came into my office and stated that he received the contract for the work of the Mackay project for the Lost River Irrigation Co. and had been authorized by them to purchase cement; asked me what we would furnish it for. I advised him that we would give him the cement for

(Testimony of Osborne B. Gilson.)

\$2.84 in bulk per barrel, including freight to various points that he would want it to go to, and that according to custom the sacks would be charged for at 10¢ extra to be paid for at the time the cement was paid for, and that a like amount would be deducted when sacks were returned in good condition. He asked about deliveries, and I told him we would be in shape to give him deliveries about any time he wanted them, subject, of course, to such delays as we were not accountable for, strikes, fires, etc., as most contracts cover. He said he was purchasing the cement for the Big Lost River Irrigation Company. Mr. James Pingree as secretary of the Union Portland Cement Co. signed the contract offered in evidence marked Plaintiff's Exhibit No. 24, in my presence, and I witnessed his signature. That contract contains a provision and the agreement that my talk with Mr. Corey did.

There was no change from the contract we had with Mr. Corey for the furnishing of cement different from that contract. We began furnishing cement to the Big Lost River Irrigation Co. the latter part of August, 1909. The Union Portland Cement Co. [186] sent bills to Corey Bros. Construction Co. for the cement that was shipped. (Witness identified a few bills as having been sent to the Corey Bros Construction Co.)

Mr. Corey advised that he was going to act as the representative of the Big Lost River Irrigation Co. and that he had some arrangement regarding the haul and it would be convenient for him to have the

(Testimony of Osborne B. Gilson.)

bills all made out in duplicate. They were sent out from our offices under my direction.

Some of the bills have different prices marked on them on account of the difference in the market price and the price made to Corey Bros., but corrections were afterwards made in these bills and the charge per barrel was \$2.84. I cannot tell offhand how much cement we shipped the Big Lost River Irrigation Co., but it amounted to \$37,406.88. We have been paid \$23,632.32, and there is due \$13,774.56, which has not been paid. We have sent a statement of this amount to the Big Lost River Irrigation Co., the same being identical with statement of account set out in lien attached to complaint in intervention.

Mr. Henderson offered in evidence the statements sent by the Union Portland Cement Co. to Corey Bros. Construction Co. covering all the shipments, which statements had been experted and checked. They were thereupon marked Plaintiff's Exhibit 60.

Mr. Henderson thereupon offered in evidence a summary of the above-mentioned bills which had been checked by witness and was correct. Same was marked Plaintiff's Exhibit No. 61.

Cross-examination of Mr. GILSON.

(By Mr. POWELL.)

The contract marked Exhibit No. 24 was signed by our company on September 18th, 1909.

Car No. 3510 for 212 barrels of cement was shipped on October 8th and this was the first bill in which the cement was billed at \$2.84 per barrel. There was a mistake made in one of [187] the bills

(Testimony of Osborne B. Gilson.)

where the boys billed it at \$3.01, but as appears in the account marked Exhibit No. 62, they received credit for \$74.01, which credit is entered under date of November 15th, 1909. I don't know whether the account was entered in our books under the name of Corey Bros. Construction Co. in connection with the Big Lost River Irrigation Co., or to Corey Bros.

At the request of Corey Bros. all of the cement was billed, shipped and consigned to them. We had no written contract with the Big Lost River Irrigation Co. until Exhibit 24 was signed. All the contract we had before that was a verbal contract with Mr. Corey. We had no contract with anybody but Mr. Corey; all the cement was consigned to him and all the payments were made by him. We rendered a bill to the Big Lost River Irrigation Co. for cement when the payments ceased and Mr. Corey said he couldn't get any more money from them. I couldn't give you the date when we rendered a bill to the Irrigation Co., but we rendered monthly statements through Corey Bros. I will find out the date from our office and produce some telegrams regarding this bill.

[Testimony of W. W. Corey, for Plaintiff
(Recalled).]

Cross-examination of W. W. COREY.

(By Mr. MILLER.)

I did not negotiate the \$25,000 note, nor did I try to raise any money on it as collateral.

I am not sure, but I think we got the contract from

(Testimony of W. W. Corey.)

the Union Portland Cement Co. and in that contract the Cement Co. agreed to furnish cement at \$2.84 per barrel.

[**Testimony of Frank D. Higginbotham, for Plaintiff (Recalled).]**

Cross-examination of FRANK. D. HIGGINBOTHAM.

(By Mr. POWELL.)

I wrote the letter offered in evidence as Trustee's Exhibit No. 24 and the contract referred to is Plaintiff's Exhibit [188] No. 24. I did not procure them to sign the contract nor was it delivered to me at that time. I wrote that letter at the request of Mr. Corey. I did not see the contract.

Certified copy of lien filed by Corey Bros. Construction Co. against the Big Lost River Irrigation Co. in Blaine County, Idaho, was then offered in evidence and marked Plaintiff's Exhibit No. 62 over objection of Mr. Haga.

Certified copy of a lien of Corey Bros. against the Big Lost River Irrigation Co. filed in Bingham County, Idaho, was then offered in evidence and marked Plaintiff's Exhibit No. 63 over objection of Mr. Haga.

Certified copy of lien of Corey Bros. against the Big Lost River Irrigation Co. filed in Fremont County, Idaho, was then offered in evidence and marked Plaintiff's Exhibit No. 64, over objection of Mr. Powell.

It is admitted that the liens filed by Corey Bros.

Construction Company and by Union Portland Cement Company were filed on the dates set out in their bills of complaint.

[**Testimony of C. B. Hurtt, for Plaintiff.]**

Direct Examination of C. B. HURTT.

(By Mr. HENDERSON and Mr. MILLER.)

The Big Lost River Irrigation Co. has never made application to the State Board of Land Commissioners of Idaho to apply for patent to the United States for lands under segregation lists No. 8 and 18 and shown by Plaintiff's Exhibits Nos. 1 and 2.

I signed the contract between the Arnold Company and the Big Lost River Irrigation Co. as president. The contract was offered in evidence and marked Plaintiff's Exhibit No. 65. I do not think we had any other contract with the Arnold Co. during this engineering work. Before this contract was signed we had an oral agreement with the Arnold Co. for doing this engineering work on the Big Lost River Irrigation project and this verbal contract was afterwards reduced to writing.

The Arnold Co. did all the engineering work on that project [189] from its inception in June, 1909, to the time we closed down and acted as engineers in preparing the plans before June, 1909.

The files in the case No. 341, Union Portland Cement Co., a Corporation, Plaintiff, and Big Lost River Irrigation Co. et al., Defendants, composed of the bill in equity filed October 22d, the separate answer of the Big Lost River Irrigation Co. to such bill of complaint, filed March 10th, 1911, and the an-

swer of the Continental & Commercial Trust & Savings Bank, formerly the American Trust & Savings Bank, and Frank H. Jones, defendant, were thereupon offered in evidence, but were not marked.

[**Testimony of W. E. Corey, for Plaintiff.]**

Direct Examination of W. E. COREY.

(By Mr. HENDERSON.)

My name is W. E. Corey. I live at Ogden, Utah. I was connected with the Corey Bros. Construction Co. during the years 1909 and 1910. As I recall, in 1903 the firm name was changed from Corey Bros. and Alden Company to Corey Bros. Construction Company. During the years 1909 and 1910 I was working on the Mackay Dam as superintendent under the direction of W. W. Corey and the engineer for the Big Lost River Irrigation Co. In my judgment we dumped about 1,000 yards of gravel while the trestle was running diagonally across—trestle on the second lift, as shown by Defendants' Exhibit No. 14.

Cross-examination of W. E. COREY.

(By Mr. MILLER.)

Beginning at the right end of the nearest trestle, as shown on Defendant's Trustees' Exhibit No. 14, there was a trestle crossing the river parallel to the core-wall, which is not shown on the picture. At the base of the dam there was a lift of about [190] 20 or 25 feet, and before this picture (Defendants' Trustees' Exhibit No. 14) had been taken there had been a trestle placed below the core-wall to the right

(Testimony of W. E. Corey.)

in this picture crossing the river and dam from that.

Mr. Miller offered in evidence a picture which was marked Defendants' Trustees' Exhibit No. 25.

This last exhibit shows the fill in the first lift and Exhibit No. 14 shows the trestle for the fill on the second lift and the base of the trestle, as shown in Exhibit 14, is resting upon the top of the first lift. Exhibit 25 shows the fill on which the trestle shown in the foreground of Exhibit 14 was afterwards built. Exhibit 25 shows the condition in which the first lift was as it was in the course of construction. Exhibit 25 shows a track running from a point marked "A" on the picture to a point marked "B," the latter being on the lower side of the dam, on the downstream side. A portion of this track was built on a trestle and a portion was not. The track marked on No. 25 extends on up to the first borrow-pit shown in No. 14, where we had a small shovel, a Model 20. It came on down on this track (represented by A & B in No. 25) around, and we put a trestle out this way to the curve in towards the bank and below the core-wall, extending our trestle out and working to the core-wall on a curve from where the shovel was in No. 14 onto a track that is shown in No. 25. This track extended on across to connect with the mountain from B right on across the river and then was dumped into the core-wall, until we quit work. To the best of my recollection there was scarcely anything at all dumped between the core-wall and the upper side of the slope on that track, unless it was

(Testimony of W. E. Corey.)

just to make a grade there. There was no trestle on that side at all. The dumping to the lower side or downstream side of the core-wall from the trestle over to B was done from this track. The track from the core-wall over to B [191] was on a trestle, as I recall. To the best of my recollection the core-wall at the point where this track in No. 25 crossed it was constructed before the track was placed there. We put the concrete in in lifts, the first lift across the river was 5 foot foundations, the next with a 10 foot lift and the next, I think, with an 8 foot lift. If I remember right, now, some place there we put in a 10 foot lift on top of our first 5 foot foundation, and then excavated that trench out again and put in our forms and an 8 foot lift. That is the best of my recollection now. The concrete extended at least 10 feet above the surface of the ground at the time that track was put over there. I don't remember at that point exactly, but if we excavated that channel out we then put a trestle across the trench after putting the concrete in. Exhibit 25 also shows the core-wall and this same track—A-B on 25—crossing the core-wall and a trestle upstream from a parallel to the core-wall. Exhibit 26 shows the condition as it was at one time during the construction of the lower lift. The track marked A-B in 25 and also in 26 is the same track, although we changed its position by throwing it backward and forward to suit the occasion and it may not be in the same position in 26 that it is in No. 25. [192]

A portion of the fill which you see on Exhibit No.

(Testimony of W. E. Corey.)

26 was dumped from the track A-B. A portion of this was dumped from a track that came across on the upper side of the core-wall. This portion of the fill from above the core-wall to "A," may not have been dumped from that track.

Where you draw the dotted line from "A" down to the lower part of the picture is the place where the fill from track A-B connects with a fill evidently dumped from a track in the picture indicated by the dotted line A-C. This track A-B was, at one time, along the line or about the line of A-C.

Part of the fill upstream from the core-wall was dumped from a track in the position of A-C. At about the point of the dotted line running from A-D is where these two fills apparently connect. I think this portion of the fill to the right of the line A-D was dumped from the track A-B, whereas the portion of the fill to the left of the line A-D was dumped from the track A-C. As I stated in my statement before, there was a little bit dumped in here to level up our ground, but there was no particular amount of materials dumped in on this side of the core-wall from the track.

Mr. MILLER.—I offer these two pictures in evidence that have been marked Defendants' Trustees Exhibit No. 25 and No. 26.

Redirect Examination.

(By Mr. HENDERSON.)

Practically every yard of gravel that was used on that dam was dumped from a line of railroad track parallel to the core of the wall except that 1000 yards.

(Testimony of W. E. Corey.)

There might have been a train load or two to level up our dumps, or something of that kind, that was not.

Recross-examination.

(By Mr. MILLER.)

Not all of the fill that is shown on the first trestle in Exhibit No. 14^f, beginning at the track upstream from the [193] core-wall and parallel to it and extending over to the point on this trestle where the fill ends, was dumped from this trestle. There was a portion of it.

Looking at this trestle which appears in the foreground of this picture, you will notice at the right of the trestle all of the dumping from this trestle appears to come down to the top of the first lift. The fill from there comes down to this other lift below. That shows that over here or on the downstream side of the core-wall where the dumping from this trestle occurred, there had been dumping above the first lift, but this trestle here is going pretty near straight across the fill. This track here that comes across the core-wall was built, the greater portion of it, up to within a few feet of the core-wall on the ground that was put in there from another lift coming parallel to the core-wall before this trestle shown in the foreground of this picture to the north of the core-wall and between the core-wall and this parallel track that shows on the north or upstream side of it, was built. Exhibit No. 16 shows that same track and trestle crossing the core-wall that is shown on Exhibit No. 14.

Mr. Haga, on behalf of the defendants' trustees, is

given leave by the Court to amend the amendments to the answer filed on April 5th.

Order that replication on file stand to the answer as amended.

[**Testimony of W. W. Corey, for Plaintiff
(Recalled).]**

W. W. COREY, recalled.

Direct Examination.

(By Mr. HENDERSON.)

Before the Union Portland Cement Company shipped any cement to our company for the Big Lost River Irrigation Company, I had a talk with Mr. Hurtt about getting cement. It was about the last of July or the first of August. Mr. C. B. Hurtt and Mr. Speer and Mr. Rosecrans were present at the time. The question of cement came up and they told me that the arrangement was made for me to make a contract if I could for the cement; to look around and see what I could do to make a contract, subject, of course, to [194] their approval. I talked with Mr. Gilson. The conversation was that I make arrangements or bargain with him for the Big Lost River Irrigation Co. to furnish the cement on the project, for which I had a contract. The cement was shipped in the name of the Corey Bros. Construction Co. That was done because I knew when I wanted it and could handle it better than to try to get somebody else. I would order and have it shipped in our name and billed to us; then we were to send the bill to the Trowbridge & Niver Co. for the Big Lost River

(Testimony of W. W. Corey.)

Irrigation Co. to be paid. We did not get a cent out of it. We just acted as agents between the two. As they paid, we paid the other people. The cement was used for the benefit of the Big Lost River Irrigation Co. on their system.

[**Testimony of Orson O. Corey, for Plaintiff
(Recalled).]**

ORSON O. COREY, recalled.

Direct Examination.

(By Mr. HENDERSON.)

My name is Orson O. Corey. I live in Ogden, Utah; lived there practically all my life; am a member of the corporation of Corey Bros. Construction Co. I am a director, and was a director during the years 1909 and 1910. I worked for the Corey Bros. Construction Co. in the building of certain canals and dams on what is known as the Big Lost River project. In building the canal, we took orders from the engineers of the Big Lost River Irrigation Co. I did the work in accordance with their instructions.

Objection by Mr. Ruick.

Cross-examination.

(By Mr. RUICK.)

When I refer to the engineers of the Big Lost River Irrigation Co., I mean Mr. Drummond, Mr. Huff and Mr. Raschbacher. Mr. Drummond had charge of a number of engineering parties and they cross-sectioned the work and laid it out and told us what they wanted. [195] I understood that Arnold & Co., of Chicago, were employed by the Big

(Testimony of Orson O. Corey.)

Lost River Irrigation Co., and that Drummond and Raschbacher and these others were employed by The Arnold Engineering Co. for the Big Lost River Irrigation Co. I understood that The Arnold Co. had a contract with the Big Lost River Irrigation Co. to do the engineering on that project.

[**Testimony of Osborne B. Gilson, for Plaintiff
(Recalled).]**

OSBORNE B. GILSON, recalled.

Direct Examination.

(By Mr. HENDERSON.)

Telegrams and letters passed between the Union Portland Cement Co. and the Big Lost River Irrigation Co. The papers you hand me are two telegrams sent by our company and one by the Big Lost River Irrigation Co.; one letter from the Big Lost River Irrigation Co.; one letter from our company, and a statement. The one bearing the earliest date is a letter from the Union Portland Cement Co. to the Big Lost River Irrigation Co., Boise, Idaho, dated July 13, 1910. With that letter, I sent a statement of the account. I addressed the letter to the Big Lost River Irrigation Co., Boise, Idaho.

Letter and copy of account offered in evidence. Objected to by Mr. Powell. Said letter and account were pinned together and thereupon marked Plaintiff's Exhibit No. 66.

I received a letter in reply to that one from the Big Lost River Irrigation Co.

Mr. HENDERSON.—We offer that letter in evidence.

(Testimony of Osborne B. Gilson.)

Marked Plaintiff's Exhibit No. 67. Objected to by Mr. Powell.

Letter read into evidence by Mr. Henderson. Objected to by Mr. Powell.

Letter from the Big Lost River Irrigation Co., dated Boise, Idaho, July 16, 1910, addressed to the Union Portland Cement Co., Masonic Building, Ogden, Utah, acknowledging receipt of [196] their letter of the 13th with statement enclosed, stating that they will be unable to send remittance until the fore part of the next week; Mr. Hurtt being in Chicago looking after matters pertaining to the finances of the company; signed by secretary of the Big Lost River Irrigation Company.

I sent some more telegrams to the Big Lost River Irrigation Co.

A copy of telegram offered in evidence and objected to by Mr. Powell on the ground of incompetency.

Telegram thereupon marked Plaintiff's Exhibit No. 68.

I received a reply to that telegram.

Telegram handed to Mr. Powell; offered in evidence; Plaintiff's Exhibit No. 69; objected to by Mr. Powell.

Telegram read in evidence:

(Testimony of Osborne B. Gilson.)

"Boise City, Idaho, July 26th.

Union Portland Cement Co., Ogden, Utah.

All accounts forwarded Chicago. Expect payment very early date.

BIG LOST RIVER IRRIGATION COMPANY."

On August 1, 1910, we sent a message to the Big Lost River Irrigation Co., at Boise, as follows:

"Your wire 26th. What is the situation now?"

Telegram handed Mr. Powell; offered in evidence; Plaintiff's Exhibit No. 70. Objected to by Mr. Powell.

I am still waiting for an answer to that one.

Cross-examination.

(By Mr. POWELL.)

This statement, Exhibit No. 66, which was enclosed with the letter of July 13th, the earliest item there shown, was April 1st. All the cement furnished prior to that time, I presume had been paid for. That is a correct statement of the account. [197] It was a correct statement of the account at that time. Whether it goes as far as the first shipment, I don't know. It commences with the shipment of April 1, 1910. This statement was sent to show the balance due. It shows some of the items. I don't know whether it shows all of them. That statement would indicate that all cement sold to that time had been paid for. I can examine my books and tell you whether it had all been paid for. I will have to go to the hotel and look them over. That statement was made up under my direction and that showed a bal-

(Testimony of Osborne B. Gilson.)

ance due of \$14,486.44. It was a true statement of the account at that time, and everything prior to that date had been paid. The Corey Bros. Construction Co. advised us that they would pay for all of the cement as they received the money from the Big Lost River Irrigation Co. We had no agreement from them that they would pay for it. We did not look to them for pay at all. We charged it to the Corey Bros. Construction Co. on the books but if we do not realize from the Big Lost River Irrigation Co., we have no agreement by which we can look to Corey Bros. Construction Co. for payment.

Redirect Examination.

(Mr. HENDERSON.)

I shipped that cement pursuant to our contract with the Big Lost River Irrigation Co.

Objected to by Mr. Powell as calling for a conclusion.

[**Testimony of A. T. Corey, for Plaintiff
(Recalled).]**

A. T. COREY, recalled.

Direct Examination.

(By Mr. HENDERSON.)

We received the first carload of cement from the Union Portland Cement Co. on the first or second day of September, 1909. After looking over the data, I will say that the first cement was received at the station on the first of September, [198] 1909, and I paid the freight bill and receipted for it on the second day of September, 1909. The cement was used

(Testimony of A. T. Corey.)

in the construction of the Big Lost River Irrigation Co. project. Not all of the cement that was received from the Union Portland Cement Co., according to these bills, was used on the Big Lost River Irrigation project. All that was billed against them was, but there were, I think, three cars that we paid the Cement Co. for that we used ourselves. We paid for those. The Big Lost River Irrigation Co. did not pay us.

Cross-examination.

(By Mr. POWELL.)

Mr. HENDERSON.—It is agreed that those three cars of cement which were not used in the Big Lost River Irrigation Co. project are in this itemized statement attached to my statement of lien.

Redirect Examination.

(By Mr. HENDERSON.)

I sent the Union Portland Cement Co. the money for those three cars.

Recross-examination.

(By Mr. POWELL.)

That was, I think, in the fall of 1909. The way that was: cement was very hard to get then and we had it coming faster than we needed it, and we spoke to the engineers, and the Masonic Lodge was putting in a foundation there, and we resold it to the Masonic Lodge. We told the engineer about it and as long as he didn't care, it was all right. This statement shows the cement bought from the Union Portland Cement Co. which was billed to the Big Lost River Irrigation

(Testimony of A. T. Corey.)

Co., and the payments received from the Big Lost River Irrigation Co. on account of this cement.

[**Testimony of Osborne B. Gilson, for Plaintiff (Recalled).]**

OSBORNE B. GILSON, recalled.

Direct Examination.

(By Mr. HENDERSON.)

I heard Mr. Corey state about the three carloads of cement [199] shipped by the Union Portland Cement Co. to Corey Bros. Construction Co. The first time I heard about that was to-day. If these three cars of cement were diverted by Corey Bros. Construction Co., they are contained in my mechanic's lien.

Cross-examination.

(By Mr. POWELL.)

So far as I know, it didn't go into this work at all.

[**Testimony of C. B. Hurtt, for Plaintiff (Recalled).]**

C. B. HURTT, recalled.

Cross-examination.

(By Mr. POWELL.)

I attached the signature of the Big Lost River Irrigation Co. to Plaintiff's Exhibit No. 24. Looking at Defendants' Trustees' Exhibit No. 24, and Plaintiff's Exhibit No. 24, my recollection is that I signed the contract—Plaintiff's Exhibit No. 24—between the first and 15th of October, 1909. I observed that the price of the cement was to be \$2.84 per barrel. Early in the negotiations, we requested Corey to make the

(Testimony of C. B. Hurt.)

best arrangements he could for cement. I think the bills for the Portland cement went to Chicago and were included in the estimates of Corey. I recollect distinctly as to one of the bills coming to my office, but as to any more than that, I don't know. We practically paid none of these bills direct from this office. I did not see the cement. I saw some of the bills and we had a contract with them to furnish the cement. I don't think any of the bills were paid from our office. One might have been—I am not positive as to that.

(Mr. MILLER.)

I am still president of the Big Lost River Irrigation Co.; still exercising the duties and privileges of that office and appropriating the emoluments thereof.

The water rights that are sold are in writing. Approximately 62,000 acres of land and water rights were sold under the Big Lost [200] River project—that is, water rights for about 62,000 acres of land. The project is designed to water about 102,000 acres. The aggregate amount of the water rights sold, in dollars and cents, is about \$1,900,000. Practically all the contracts are with the trustees in Chicago, deposited under the terms of the trust deed, to secure the bondholders. Approximately, there are seven or eight hundred individual contracts. Practically no water has been delivered to these purchasers under those contracts. I think last season there was a small acreage received partial water supply during the season. The water was not delivered to such an extent under these contracts so as to put the com-

(Testimony of C. B. Hurtt.)

pany in a position to collect on them. The Irrigation Company, in its present position, is not in a position to secure title to the land from the State under the Speer contract. From the time that the company was organized—that is, from the time it was chartered—and from then on, I was aware that the Corey Bros. Construction Co. was proceeding with the work under this contract which we had with the Big Lost River Irrigation Co. Mr. W. W. Corey, president of Corey Bros. Construction Co., during the month of July, 1909, conferred with me personally, from time to time on the work. The Big Lost River Irrigation Co. was organized for the purpose of taking over the contract that Speer had with the State; Speer's right acquired from the prior company, and for the purpose of proceeding with the contract already agreed upon with the Corey Bros. Construction Co. I do not think that the estimates issued by, or in the name of, the Arnold Co. to the Corey Bros. Construction Co. were ever submitted to me. They were never submitted to any of the officers here to my knowledge, or ever approved by the Big Lost River Irrigation Co. or any of its officers here. Neither I nor the members [201] of the executive committee ever paid any of these estimates. I think the subsidiary company described as the Lost River Water Co., was provided for in the contract between Mr. Speer and the State Land Board. The articles of incorporation of said company, I think, are in the hands of the receiver or in our office. I will look and see if I have them. Our contract with pur-

(Testimony of C. B. Hurt.)

chasers of water rights provided for their acquiring stock in that company. That company had a capital stock of 100,000 shares of \$1.00 each.

Objection by Mr. Henderson on account of not being the best evidence.

I have a form of this contract with the various purchasers of water rights. I will produce one of these. I think the contracts provided for one share for each acre of water rights purchased. The State of Idaho, through its officers, ordered the work stopped upon that dam, and the work was stopped pursuant to that direction, and that action was taken by the State because the State claimed that the construction was not in accordance with the contract. After the State stopped the work on the dam, I do not think the company was able to dispose of bonds. I do not believe they tried. There has been no work done on the dam excepting what was done by the State—putting in a temporary spillway.

Redirect Examination.

(By Mr. HENDERSON.)

It has been reported that \$200,000 worth of these bonds issued by the Big Lost River Irrigation Co. were converted by Trowbridge & Niver Co. and the company never received any of the proceeds. Our records show that to be the case too. That amount of bonds was delivered to Trowbridge & Niver Co. which they didn't account for. So far as I know, that \$200,000 of [202] bonds has been sold and part of the bonds are represented by the trustees. Several months before the State stopped the work

(Testimony of C. B. Hurt.)

on this dam, the Big Lost River Irrigation Co. was in financial difficulties.

There were no bonds sold after the Trowbridge & Niver trouble. It became public, my recollection is, February, 1910. First I heard a rumor about the first of January, 1910. The rumor was that they were undertaking more business than they could handle financially. We relied on the Arnold Co. as to the correctness of the estimates issued by them to the Corey Bros. Construction Co. If those estimates had been submitted to us by the Arnold Co., or by the Corey Bros. Construction Co. we would not have known whether they were correct or not. We had to depend upon the Arnold Co.

Objected to by Mr. Powell as being incompetent.

They are the only figures we had to depend on, and they are right so far as the company knows.

Objected to by Mr. Miller.

We have never repudiated them. I do not mean to say we have sold 62,000 acres of land. We have sold 62,000 acres of water rights—that is, water rights to be used on 62,000 acres of land. The records show in the State Engineer's office that all the water rights in the Big Lost River had been appropriated long before the Big Lost River Irrigation Co. went in there—that is, the water at low season.

Objected to by Mr. Ruick.

The object of constructing the dam at Mackay was to store the flood waters of the Big Lost River. If the dam is not completed, the project will never be successful. It will practically be unable to water any

(Testimony of C. B. Hurtt.)

of the lands that have been segregated by the [203] State. Last year, during the season, I think we watered three or four hundred acres. That was only for part of the season. The dry season comes in August. The success of the Big Lost River Irrigation Co. project depends upon building this dam and having this reservoir site.

Recross-examination.

(By Mr. MILLER.)

This dam or some other dam. Our records show that \$200,000 of bonds were delivered by the trustee to Trowbridge & Niver Co., of which they did not make any accounting.

Q. I believe you stated that none of the estimates made by the Arnold Co. have ever been repudiated by the Big Lost River Irrigation Co. It is equally true that none of these estimates have ever been received, approved or recognized by the Big Lost River Irrigation Co.

A. None of those estimates have ever been received at this office.

Redirect Examination.

(By Mr. HENDERSON.)

I did not see any of these estimates until after the Trowbridge & Niver trouble came up, and after I saw them, I did not repudiate them. I have spoken with Mr. Speer and Mr. Niver a number of times since they have had their financial troubles. I don't remember either Mr. Speer or Mr. Niver having told me there was \$200,000 worth of bonds they had sold which they had not accounted for. The records show

(Testimony of C. B. Hurt.)

that there was \$200,000 worth of bonds for which they made no accounting to the Big Lost River Irrigation Co. We have made a demand on them. We received no reply. We have made a written demand, and to that they did not make any reply. I have seen Mr. Speer in Chicago a number of times; also Mr. Niver, and talked over this matter. As president of the Big Lost River Irrigation Co., I am interested in the \$200,000. The Trowbridge & Niver Co. gave us to understand that we knew the situation well enough to know that they could not pay the amount at that [204] time. They have never accounted to us, but they have tried to account to Mr. Riley of the Bondholders' Committee. Mr. Riley, who represents the Bondholders' Committee down there, has tried to fix it up.

Objected to by Mr. Powell.

I had a talk with reference to the whole situation with Niver and Speer and they stated that, at this time, they could not make a settlement with the Big Lost River Irrigation Co. On several occasions they admitted that they owed the company \$200,000.

Mr. CLINTON.—I make the same stipulation that Mr. Ruick has made on page 203 of the stenographer's transcript. I consent to that for the Big Lost River Irrigation Co. This statement is as to residence of parties defendant.

[**Testimony of Goyne Drummond, for Plaintiff
(Recalled).]**

GOYNE DRUMMOND, recalled.

Direct Examination.

(By Mr. HENDERSON.)

I have been acquainted with William Mooney about six years. During that time, his place of residence has been at Riverton, Wyoming. He was still living there when I came away.

[**Testimony of W. W. Corey, for Plaintiff
(Recalled).]**

W. W. COREY, recalled.

Direct Examination.

(By Mr. HENDERSON.)

During the month of August, 1909, I had, to the best of my recollection, a force of about five hundred men working for the Big Lost River Irrigation Co. It continued about the same throughout the month. They worked during the whole month.

[**Testimony of Heber Q. Hale, for Plaintiff.]**

HEBER Q. HALE, witness for the plaintiff.

Direct Examination.

(By Mr. HENDERSON.)

My name is Heber Q. Hale. I live in Boise. I have lived here six years. I am chief clerk of the State Board of Land Commissioners of the State of Idaho. I am acquainted with the records and proceedings that have taken place in that board. I am familiar with the proceedings that have taken place in that [205] board between it and what is known

(Testimony of Heber Q. Hale.)

as the Big Lost River Irrigation project. I recognize Plaintiff's Exhibit Nos. 1 and 2 that you show me. Those are the articles of agreement between the Government and the State of Idaho, sometimes known as Segregation Lists No. 8 and No. 18. These are the contracts or what we term articles of agreement, segregating the lands under a particular list to the State of Idaho, embodying the contract as well between the Secretary of the Interior and the State. These are certified copies of the contract on file in my office. Neither the State of Idaho nor the State Land Board has ever made any application for patents for those lands. No patent has ever been granted by the United States to the State of Idaho for those lands.

Q. I show you Plaintiff's Exhibit No. 14 which is a certified copy from your office of the agreement between the State of Idaho and George S. Speer, calling your attention to page 4. This copy refers to Schedule A, hereto attached, which I do not find attached to this certified copy.

A. Schedule A was never filed in my office in connection with this contract, and, for that reason, we gave you no certified copy of it. I do not know of anything in connection with this contract which purports to be in my office designated as Schedule A.

Cross-examination.

(By Mr. MILLER.)

We have certain maps of the Big Lost River Irrigation project and I am not prepared to testify at this time just whether those maps would be con-

(Testimony of Heber Q. Hale.)

sidered as plans and specifications as designated under what Schedule A intends to include. If there has been filed in the State Engineer's office, and approved by the State Engineer, not only blue-print plans, but also detailed specifications [206] of the dam and canal, they might take the place of Schedule A, so far as the files of the Engineer's office are concerned, and I might say further, that his file in reference to the canals and detailed findings of the surveyors and engineers, are more complete than in my office, but I hardly think that the filings in his office could exactly mean to take the place of Schedule A as completing the files in our office. Still, if I understand your question correctly, he may have all the information in his office on file which Schedule A calls for. Unquestionably he has. It is quite customary in our office for these plans and detailed specifications to be filed after the execution of the contract and the filing of that, and when so filed, they are considered a part of the contract. If the plans and specifications required by Schedule A are filed in the Engineer's office and are not filed in our office, they would have the same official effect, filling the requirements of Schedule A, but we would consider our files incomplete to that extent. The custom in our office has been to accept and file, and usually approve, the plans that bear the approval and signature of the State Engineer in reference to canal structure, reservoir and specifications, etc. It is the State Engineer's approval that we act upon.

(Testimony of Heber Q. Hale.)

Redirect Examination.

(By Mr. HENDERSON.)

My opinion is that the plans as first submitted in connection with certain of the projects in this State which have come under my observation, have of necessity been changed and altered a little to meet conditions later on, and consequently have not been strictly followed, or could not be exactly followed, as first outlined. The changes that have been made, if any, have been by the approval and with the consent of the State Board and [207] the State Engineer.

Objected to by Mr. Haga as incompetent and irrelevant and immaterial.

Recross-examination.

(By Mr. HAGA.)

I don't know of any radical changes that have been made without the consent of the State Land Board in connection with the State Engineer's approval.

Mr. MILLER.—After consultation with my associates, we might admit that not in every instance have the plans been followed.

[Testimony of Osborne B. Gilson, for Plaintiff
(Recalled).]

OSBORNE B. GILSON, recalled.

Cross-examination.

(By Mr. POWELL.)

I now have the books and accounts of the Union Portland Cement Co. before me. The heading of the ledger shows Corey Bros. Construction Co. are on Sheet 1 and 2; and Big Lost River Irrigation Co.

(Testimony of Osborne B. Gilson.)

and Corey Bros. Construction Co. on page 3. We have no day-book journal. We make the entries on the ledger from our invoices and charge direct. The invoices are always made up under my supervision. I have the bookkeeper here who made those entries. I was not present when the cars were loaded. I don't know personally what went into the cars. The entries on the ledger sheet which I have before me are made up from our sales account. The account book is made up by the shipping clerk at the plant. I was not at the plant when those particular entries were made. The first entry on the ledger sheets of this account on our books, is dated August 26th, on Sheet No. 1 under the name of Corey Bros. Construction Co., Mackay, Idaho. On that sheet appear all the entries down to and including November 27th, and all shipments down to and including November 27, 1909. Up to that time, there was no account in our books against the Big Lost River Irrigation Co., as far as the ledger went. Continued [208] in the same form on our books on Sheet 2, to and including April 26, 1910, and up to that date, there were no entries in our books against the Big Lost River Irrigation Co.

Q. On sheet 3 which you have brought into court, beginning with the items in May, the Big Lost River Irrigation Co. is named. I observe there in the blank for the name you have written, Corey Bros. Construction Co., Ogden, Utah. Above that is written Big Lost River Irrigation Co.

A. I do not know when that later entry, Big Lost

(Testimony of Osborne B. Gilson.)

River Irrigation Co. was put on this particular sheet. Up to May, we have no entries whatever in our books showing charges against the Big Lost River Irrigation Co. I do not wish to part with those sheets, but I will make exact copies of them.

Said ledger sheets were thereupon marked Defendants' Trustees' Exhibits Nos. 27, 28 and 29.

Mr. POWELL.—It is agreed that copies of the originals may be used in the record.

Redirect Examination.

(By Mr. HENDERSON.)

I know why Big Lost River Irrigation Co. was written above the name of Corey Bros. Construction Co. on Exhibit 29. It was done by the direction of our auditor who said that was the system he was putting in of including all the parties interested. We carried the account in the name of Corey Bros. Co. to facilitate the handling of the work in the office, because the bills were rendered that way and the bills of lading were that way, and shipping instructions were shown as Corey Bros.

Mr. POWELL.—Motion to strike out.

[**Testimony of P. L. Williams, for Plaintiff.]**

P. L. WILLIAMS, witness for plaintiff.

Direct Examination.

(By Mr. HENDERSON.) [209]

My name is Parley Lycurgus Williams. I live in Salt Lake City, and am an attorney at law. I have been practicing attorney something over forty years. Have been admitted into all the State and United

(Testimony of P. L. Williams.)

States courts for Idaho and Utah, and have practiced law in Idaho. I am general attorney for the Oregon Short Line Railroad. I have a general idea of what is involved in the pleadings.

In my opinion, I would consider \$25,000 a minimum charge, and I should say \$30,000 would be a reasonable compensation, of counsel considering the amount of work and labor involved for preparing and filing mechanic's lien in the counties of Custer, Blaine, Bingham and Fremont, in the State of Idaho; also for filing a bill in equity in the United States Circuit Court in and for Idaho, October 15, 1910, for foreclosing said mechanic's lien; also for filing amended bill bringing in new parties, where the amount in controversy is about \$575,000; also in arguing the plea in bar; filing replications to the several answers; demurring to the answer filed by Bondholders' Committee; also bringing case on for hearing; attending trial; introducing evidence, and doing all the other legal work necessary in obtaining a decree of foreclosure and proceeding with the sale of the property and the issuance of certificates and deed.

Objected to by Mr. Powell.

Cross-examination.

(By Mr. POWELL.)

I have practiced law a little over forty years—about forty-two years. I was first engaged in practice of law in Wyoming for three or four years, from the time of the organization of that territory in the spring of '69. I have resided in, and practiced law

(Testimony of P. L. Williams.)

in Salt Lake City forty years. I came there from Wyoming in '71. I have been general counsel for the Oregon Short [210] Line for 15 years. I am doing special work for the railroads. It was a minor part for the first twenty-five years of my practice and, for the last few years, six or eight, has taken practically all of my time. Of course, there is some business of old clients to which I give attention. Of course, it has had a tendency to divert my effort from general practice, and my time is substantially all taken now in the railroad business. For the last eight or 10 years, I have practically withdrawn from the general practice of law. I have had considerable practice in the State of Idaho. I don't recall trying any cases for private clients for the last ten or twelve years. I am pretty well informed as to the usual and customary charges in the State of Idaho. I think they are pretty good chargers up here. I have not had an opportunity to charge any of the citizens of Idaho for the last, say, dozen years in litigation in their business. I did not take into consideration the fact that they were pretty good chargers up here in making my answer. It is rather based on personal experience in Utah and other States in the Federal courts in connection with litigation somewhat similar—receiverships and foreclosures, etc. Most of the foreclosures and receiverships that I refer to were railroad affairs, some involving considerable amounts that were of a different class of subject matter than railroads.

Mr. Powell makes motion to strike out testimony

of witness on account of being incompetent to testify with reference to the subject matter.

[Testimony of Frank D. Higginbotham, for Plaintiff (Recalled).]

FRANK D. HIGGINBOTHAM, recalled.

Cross-examination.

(By Mr. POWELL.)

Certain documents were marked Defendants' Trustees' Exhibits Nos. 30, 31 and 32.

I was bookkeeper for the Corey Bros. Construction Co. during [211] the time of this work on the Mackay dam and canals until July 25, 1910. Trustees' Exhibit No. 30 which you show me is a correct statement according to the books of the Corey Bros. Construction Co. of cement from the Union Portland Cement Co., and payments made by Corey Bros., which was prepared by me from the books of the Corey Bros. Construction Co. Defendants' Trustees' Exhibit No. 31 is a correct statement according to the books of the Corey Bros. Construction Co. of the cement billed to the Big Lost River Irrigation Co. by Corey Bros. Construction Co., for which they received estimates from the Big Lost River Irrigation Co., and payments made to the Corey Bros. Construction Co. by the Big Lost River Irrigation Co. Defendants' Trustees' Exhibit No. 32 was prepared by me and is a true and correct statement according to the books of the Corey Bros. Construction Co. It appears from said statement that 125 barrels under date of September 16, 1909, 225 barrels under date of November 20, 1909 and 212

(Testimony of Frank D. Higginbotham.)

barrels under date of October 16, 1909, were turned over to the Masonic Lodge.

Defendants' Trustees' Exhibits Nos. 30, 31 and 32 offered in evidence; No. 32 only down to the line reading "statement of cement from Ogden Portland Cement Company."

[**Testimony of P. L. Williams, for Plaintiff
(Recalled).]**]

P. L. WILLIAMS, recalled.

Direct Examination.

(By Mr. HENDERSON.)

Mr. POWELL.—It is agreed that the testimony heretofore offered as to his qualifications may stand.

I would consider a reasonable attorney's fee for filing mechanic's lien for Union Portland Cement Co. against the Big Lost River Irrigation Co. in the various counties, and filing the bill in the United States Circuit Court to foreclose the mechanic's lien for \$13,774, I would say a moderate fee in that [212] matter would be \$1,000, and a reasonable fee would be, on a sum of that amount, I would say, ten per cent.

Mr. POWELL.—Judge, may my cross-examination of Judge Williams as to the Corey Bros. matter stand as the cross-examination here?

Mr. HENDERSON.—It can.

[Testimony of W. E. Corey, for Plaintiff
(Recalled).]

W. E. COREY, recalled.

Cross-examination.

(By Mr. MILLER.)

I don't know whether I stated yesterday that the trestles which we built for the construction of the dam were not of sufficient strength to sustain the strength of loaded cars, and that, for that reason, we built the trestle a part at a time and dumped from the end, but that is the way we built our trestles. That is true as applied to the trestles parallel with the two toes of the dam, as well as the diagonal track. There was one little place in particular that we made an exception to that, to one line crossing over the other, for just the width of the track in between, by making it double strength at that one particular point. Aside from that, the two trestles at the two toes of the dam, and parallel to the core-wall, were built a piece at a time, and we dumped from the end of the constructed trestle until it was filled there, and then extended the trestle again and dumped from the end. The dumping was chiefly at the end of the fill.

Redirect Examination.

(By Mr. HENDERSON.)

As soon as the track was filled, we dumped on the sides towards the core-wall. We did not dump any gravel over the end of the trestle at the end of the dump.

[**Testimony of Goyne Drummond, for Plaintiff
(Recalled).]**

GOYNE DRUMMOND, recalled.

Cross-examination.

(By Mr. MILLER.)

Q. I asked you heretofore about a certain letter you received from [213] Mr. Storrow requesting you to furnish him certain information.

A. I don't remember whether I preserved that letter or not. If it is preserved, it is in my files. I couldn't say whether this is an exact carbon copy or not. I remember his asking for measurements of the streams and the ditches. I cannot remember all that was in the letter, but it was inquiring as to measurements, I remember that.

Mr. MILLER.—I will ask that this document shown witness be marked for identification.

Said document marked Defendants' Trustees' Exhibit No. 33.

I will make a search for that letter and see if I can find it, and hand the same to Mr. Henderson to be presented at the next session.

I think it was just a few days before Christmas, 1909, I received from the Ogden office—I presume it was from the Corey Bros. Construction Company's office, while it had no marks on it that I could know where it came from—I got a turkey, a box of cranberries, a little box in it, and a box of cigars and there was in that package a small bottle of, I think it was Scotch Whiskey. Also on one trip, while coming from down on the Powell tracks, Mr. Corey

(Testimony of Goyne Drummond.)

got on at Arco, I think. Anyway, he came into the car in which I was sitting. He was carrying a shotgun and after a while, he said, "Would you accept a present from me?" I said, "I will, Mr. Corey, under one consideration, that you will in no way take it that I am to receive this for anything that I have done in this work." I says, "As a friend, if you will give it to me in that way, I will take it." Then he presented me with the shotgun. I was asked to come to this hearing by the Corey Bros. Construction Co. I came without a subpoena and, for the [214] last week or ten days, I have been here in daily conference with the officers of the Corey Bros. Construction Co. concerning the matters about which I have testified. I have not been promised any compensation for my time. They stated in a letter to me that they would pay for my time and expenses. There has been no agreement as to the amount.

Redirect Examination.

(By Mr. HENDERSON.)

The shotgun was handed to me in the fall of 1909. I don't remember the month. I was not influenced by the gifts received from the Corey Bros. Construction Co.

Mr. HENDERSON.—We rest, with the exception that if I can find a map of the system, I will introduce it.

Mr. MILLER.—It is stipulated and agreed between the counsel for the respective parties that the defendant's trustees may, at this time, proceed with

the taking of testimony on their behalf, the formal notice of taking same being waived, said defendants however, reserving the right to take further testimony at other times and places.

[**Testimony of Frank Milton Carhart, for Defendants (Recalled).**]

FRANK MILTON CARHART, recalled on behalf defense.

Direct Examination.

(By Mr. MILLER.)

I have been sworn and have been on the stand before. Plaintiff's Exhibit No. 14 being a certified copy of the agreement between the State of Idaho and George S. Speer, dated May 27, 1909, heretofore offered in evidence. A copy of this contract, I believe, is on file in the State Engineer's office. This contract refers to a Schedule A which is not attached to the certified copy, referred to in the contract as being "specifications hereto attached and made a part of the contract." There are specifications for the construction of the work designated in that contract on [215] file in our office.

Motion to strike out by Mr. Henderson.

Mr. MILLER.—I show you a document which I will ask the reporter to mark Defendants' Trustees' Exhibit No. 34.

Said document was thereupon marked.

A. Defendants' Exhibit No. 34 is a certified copy of the specifications for the construction of the earth dam and controlling works at Mackay reservoir site —the same earth dam and controlling works re-

(Testimony of Frank Milton Carhart.)
ferred to in that contract.

I do not think that there are other specifications on file in our office covering the dam and controlling works referred to in that contract—Plaintiff's Exhibit No. 14. I have made search there for them. I have found no subsequent ones to the date of this contract. There are some on file of a prior date to the date of the Speer contract. They were superseded by these which are here designated as Defendants' Trustees' Exhibit No. 34. These specifications referred to as Defendants' Trustees' Exhibit No. 34 are marked on the cover, June 2, 1909, by the State Engineer. The originals in our office bear the words: "Approved, June 2, 1909, (Signed) James Stephenson, Jr., State Engineer," and the signature there is the signature of James Stephenson, Jr. That is the ordinary way of approving documents of that kind. He was State Engineer at that time. When a contract of the nature of the Speer contract is filed, if any specifications are filed with it, they are very general in terms. The definite specifications are, as a rule, filed subsequently. If no specifications are filed with the contract, I should judge that those specifications subsequently filed performed the office of those described as Schedule A. They are so considered in the State Engineer's office.

Document already identified as Defendants' Trustees' Exhibit No. 34 offered and received in evidence.

(Testimony of Frank Milton Carhart.)

Cross-examination.

(By Mr. HENDERSON.)

I did not say Defendants' Trustees' Exhibit No. 34, which is the paper I just had in my hand, are the specifications that are referred to as Schedule A in Plaintiff's Exhibit No. 14. I have been nearly four years in the State Engineer's office. I am Chief Carey Act Engineer. If Schedule A mentioned in Plaintiff's Exhibit No. 14 had been filed in my office, I might not know the document as Schedule A. I do not know definitely whether there is on file in our office any paper that is referred to in the Plaintiff's Exhibit No. 14 as Schedule A. I believe there has been filed in our office a map showing the complete system known as the Big Lost River Irrigation Company's system. I would not say that it is all on one map. I think the maps we have filed cover the complete system. We have a project map on file. I do not believe that we have any project map on file in our office that shows this system any better than the map that you show me which is marked "Plaintiff's Exhibit No. 28."

Redirect Examination.

(By Mr. MILLER.)

Mr. RUICK.—Mr. Carhart, was this paper, Defendants' Trustees' Exhibit No. 34, filed in the State Engineer's office pursuant to the provisions of this contract known as the Speer contract?

A. I believe so. I think these specifications were and are recognized by the State Engineer's office as specifications filed under and pursuant to that con-

(Testimony of Frank Milton Carhart.)

tract. I believe the specifications referred to in the contract relative to the construction of the earth dam and controlling works at the Mackay reservoir site, are recognized by the State Engineer's office as the specifications for the dam and controlling works under and pursuant to the Speer contract, and they are the ones that have been [217] recognized and worked under by the State Engineer's office ever since. [218]

[Testimony of Samuel Storrow, for Defendants.]

SAMUEL STORROW, a witness called and sworn on behalf of defendants, upon direct examination testified as follows:

I am an engineer by profession; reside in Los Angeles; been practicing twenty-two years; principally devoted to structures which have to do with water, and a good deal of railroad practice; been practicing principally west of the Rocky Mountains, considerable around Denver also. My hydraulic practice has included city water works; have been either designing or consulting engineer of earth dams over 50 feet high in Idaho, California, Oregon, Arizona and Old Mexico; have been in responsible charge of dams actually built higher than 200 feet, and in charge of designing and advising on construction of dams designed for a height exceeding 300 feet, and to hold water within approximately 10 feet of their crest. I now think of six earthen dams in excess of 100 feet high that I have had to do with, either as construction or consulting engineer. I am now referring to dams actually built or in process

(Testimony of Samuel Storrow.)

of construction, not merely designed.

I was employed by a committee to examine the Mackay dam. I examined the dam in the summer of 1911, June and July; the field examination was from June 26th to July 15th. I went all over the ground and familiarized myself with it; took such maps and drawings as I could find; contract and specification; compared the structure with the plans and specifications; made repeated trips through the entire system from one end to the other of the canal and everywhere; took a large number of photographs; have had experience in photography for thirty years; during the examination or shortly afterwards I wrote a letter to Goyne Drummond at Riverton, Wyoming. This is a copy of the letter. I got no reply.

Letter offered in evidence as Defendants' Trustees' [219] Exhibit No. 33.

Mr. HENDERSON.—I object to it as incompetent and irrelevant to any issue in this action, and it tends to prove nothing whatever, and I make the further objection that all of this testimony that has been offered on behalf of defendants' trustees is irrelevant and immaterial to any issue raised by the pleadings, either by the trustees or by the Big Lost River Irrigation Company, and that it does not lie in the mouth of the trustees to prove whether the dam was constructed in accordance with the specifications or not, for the reason that there is no affirmative relief asked for in the answer of the defendants trustees.

(Testimony of Samuel Storrow.)

I examined, in connection with the Mackay dam the contract and specifications between the Big Lost River Irrigation Company and Corey Bros. Construction Company for the construction of dams, etc. This is it, Plaintiff's Exhibit 23.

I found that the material on the ground in the body of the dam had not been placed as provided in the specifications but was dumped at various angles, not always towards the core-wall; sometimes towards it, sometimes away from it. Some of the trestles were in the upper and lower toes and some were not; some were at various angles across the core-wall. I took photographs showing that condition. Defendant's Exhibit 35 shows in the foreground the second lift; from that diagonal trestle in the second lift there were fifteen or eighteen hundred cubic yards dumped—rather more. This photograph also showed dumping from roadbeds where the tracks have left their marks but the rails have been taken up; in the third lift is shown another diagonal roadway parallel to the first one, showing unmistakable evidence that the dumping had been from a similar diagonal [220] track. The reverse side of this picture shows a nearer view of the first diagonal track on the second lift; the dumping from the other diagonal track back of that shown in 35 amounted to several thousand cubic yards.

Exhibit 36 shows a continuation to the right of the same work shown on Exhibit 16; the dump shown on 36 at the extreme right is essentially parallel to the core-wall; all the balance of that lift is at an an-

(Testimony of Samuel Storrow.)

gle to the core-wall, approximately 45 degrees. The effect of building a trestle parallel to the core-wall and dumping from a car at the end of the trestle, then shoving on an empty car and dumping from the next car at the end of the trestle, and so on, is to lay a layer of course boulders along the bottom of the dump extending completely under the dam, making a blind drain, also dumping from the end makes the slope not towards the core-wall, but at right angles thereto, and, therefore, the strata are at right angles to the core-wall. This stratifies the fill with a series of strata horizontal at the base and thence others sloping upwards at right angles to the core-wall. This, in my opinion, prevents any imperviousness.

Exhibit 18 is a view taken along the core-wall from the center of the tract. It shows the material running down against the core-wall, the larger stuff falling directly [221] against it, the fine dragging behind. The reverse side of the picture is a view looking down stream from the lower borrow-pit. It shows the fill of the dam, lying on the cone of Cedar Creek; two-thirds of the dam lies on that cone.

Photographs 25 and 26, taken before I was there, show a fill dumped diagonally to the core-wall and which is not shown in my photograph; that dumping was done essentially at right angles to the core-wall.

By a comparison of measurements which I made on other parts of the structure which I recognize in these photographs 25 and 26, I estimate that the dump made diagonally to the core-wall, as shown in those pictures, exceeds several thousand cubic

(Testimony of Samuel Storrow.)

yards; that is a part of the first lift.

Picture 37 shows the dam from the hill at the right end of the dam; shows three borrow-pits and a temporary spillway and one diagonal track at the second lift, and two diagonal tracks at the first lift, back of the first.

I found very heavy leakage through the dam and some through the core-wall. The bottom of all dumps throughout the dam were composed of coarse material; in all places where the core-wall was exposed the material next to it was coarse, full of boulders, either not puddled or puddled so slightly as to leave crevices, those near the core-wall not more than half closed and sometimes not closed at all. The [222] borrow-pit was excavated so near the dam as to present an opportunity for the face of the dam to slide into the pit. At the right end of the dam next to the limestone cliff the material from the tunnel and spillway was thrown into the dam; there were large boulders there partially buried. The dam was built on top of the spillway out of the excavations. The concrete face of the dam, as far as built was a concrete of an uneven texture; some was well mixed; other parts not; the concrete was porous and broke very readily; some parts of the core-wall were in plain sight; no evidence of bonding, except when they got through building one piece came back by and by and built another. There were frequent crevices in which I could stick a knife blade, where the new work joined the old; the necessary effect was a very leaky core-wall.

(Testimony of Samuel Storrow.)

The borrow-pit nearest the river was, I should say, 10 feet from the upper toe; the other two borrow-pits showed excavations within 50 feet; the greatest depth of the borrow-pit was as much as 20 feet.

The material of the borrow-pits I examined with great care; it was rather coarse gravel, containing finer and finer gravel until the finest was powder; it was the most uniform line of borrow-pits I have ever seen; it would not be called stratified, though there were little markings or [223] lines. I discovered no hardpan stratum of any kind; I tried very hard to find it because it had been reported to me that such was there; the borrow-pits were of very uniform material as far as excavated.

The object of puddling is to get finer material from one part of the work and added to another part, to render the latter impervious to water. If the dumping is done from trestles parallel to the core-wall, always toward it, and the fill is puddled by a stream of water of the right quantity, the fine material is washed from the bank where dumped, down the slope until it meets the core-wall where it will form a pool. You will obtain a graded fill of fine stuff washed from the bank down against the core-wall where it will fill the crevices.

Part of this fill was dumped directly away from the core-wall. If this dumping had been done pursuant to specifications there was enough fine material in the borrow-pits to have made an impervious bank against the core-wall.

(Testimony of Samuel Storrow.)

Assuming that the rock excavation from the cliff was placed within 20 feet of the core-wall, unless the subsequent puddling were extraordinarily well done open work would be left. I wish to modify one answer. I saw to my mind unmistakable evidence of the excavation from the cliff being deposited 12 to 15 feet from the core-wall; that is, I recognized the rock as being the same rock as that in the [224] spillway, and I saw no evidence of its having come from anywhere else; therefore, I assumed the rock I saw came from the spillway; I saw coarse rock 10 or 12 feet from the core-wall.

If material is dumped from a trestle crossing the core-wall at an angle of 90 or 45 degrees an impervious bank against the core-wall could not be obtained by any amount of puddling. By puddling fine material is moved horizontally. If you dump from a track over the core-wall and deposit the material there dry, and then undertake to puddle you have no place from which to get your fines to add to that near the core-wall, and even if you can get a few fines from somewhere else you cannot get them into the fill just made; it won't penetrate; you cannot bring any foreign material to add to that material dumped directly against the core-wall; the only way that you could now treat the fill so as to get an impervious bank of material against each side of the core-wall, would be to take it all out and put it back again.

The effect of these blind drains that I have described running both horizontally and vertically through the dam, would be to saturate the dam when

(Testimony of Samuel Storrow.)

the reservoir was full, and the water would run out on the lower side, causing that side to slough off and make a flatter angle by [225] sliding down; the slide would work backwards step by step, and when the critical stage was reached, the dam being saturated, it would break and be destroyed. A dam so constructed, completed to a height of 120 feet would not in my opinion sustain a height of water of 100 feet; a breach would occur in the dam and the water in the reservoir would tear it to pieces.

I found a record of 113 pieces of sheet piling 6 inches wide. I had two test-pits made, one on each side of the wall beyond the sheet piling, those pits being 20 to 23 feet below the virgin surface of the ground; the wall did not extend to hard-pan, or other impervious material in the places I examined; the water leaked under the wall. I did not investigate the depth of the back filled trench at the left of the core-wall; it was buried when I was there.

The cone of Cedar Creek was of the same material as the borrow-pits; I dug pits in it from 20 to 25 feet deep; it was the same material throughout the depth. Next to an absolute test of a pit in the body of the dam I consider the gravel pits almost indisputable evidence of the composition of the earth underlying the dam.

The borrow-pits were in the cone at Cedar Creek. If we have a head of 100 feet of water in the dam, the latter being built on the cone of Cedar Creek, with a core-wall [226] extending only 6 or 8 feet below the original surface in the cone, and the back

(Testimony of Samuel Storrow.)

filled trench to the same depth, there would, in my opinion, be a very serious leakage under the fill; that would unquestionably affect the amount of water in the reservoir and undoubtedly cause the wreck of the dam; the reservoir would never fill up 100 feet unless it came mighty quick; if it came that quick the strain on the dam would be greater than if it filled slowly. I am sure it would fail if filled quickly, and I am also sure it would fail if filled slowly; if it were possible to get a head of 100 feet it would leak out quite rapidly, but it would wreck the dam before it leaked out; the dam itself would be saturated as well as the ground underneath, and saturated material with a pressure behind it is almost certain to float; that would lessen its effective weight.

The essential elements of an effective dam are a sufficiently water-tight structure on a sufficiently water-tight foundation, with weight to resist the pressure.

Where the dam is designed with a core-wall in the middle, with puddled material beside it, the office of the core-wall and puddle portion is to connect the body of the dam with the substantially impervious material below thereby forming the impervious portion of the fill; the balance of the fill is for weight and strength to resist the thrust. [227]

Besides the lack of imperviousness I saw the slope of the material as dumped, which also showed lack of sufficient puddling. I particularly examined the slopes which extended near or against the wall;

(Testimony of Samuel Storrow.)

if the material is merely dumped from the cars it would have a natural angle of repose; if puddled this angle would flatten out very much; if the angle of the dumped material is at or near the natural angle of repose, that is conclusive evidence that there has not been sufficient puddling.

I had no opportunity to observe whether or not the natural surface of the ground under the dam had been plowed except by photographs taken by the State Engineering Department and by the Arnold Engineering Company.

On the three photographs handed me I recognize places of virgin ground.

(These photographs are marked Exhibits 38, 39, 40, 41.)

To remove the central portion of the dam and replace the material by a puddling process in accordance with the specifications is not practicable; the expense would be too great. I have made estimates as to what it would cost to take this dam on this site and make a satisfactory dam of it, varying from the specifications so as to hold a 100-feet head of water; it would cost over \$600,000, assuming that [228] State Engineer did not require any more expensive work than called for by the specifications on file; if the State Engineer would leave me alone and call for no additional requirements I could build it as good as called for by the specification for \$600,000; that expense would be about the same or a little less than the cost of building a satisfactory dam on this site from the beginning.

(Testimony of Samuel Storrow.)

I found that the spillway headed in a tunnel; that did not accord with the specifications; the tunnel is not as effective for a spillway as an open cut with sides approximately the height of the tunnel, because, first, if the water rises a little higher than the crown of the tunnel, its area does not increase; since the dam is almost invariably built higher than called for by the design to allow for settlement, it is always a fact that a cut can take off more water than a tunnel; second, the cut is much less likely to be clogged with debris; there is no doubt about that at all.

The friction in an open cut is about three-quarters of the friction in a tunnel.

I found the construction of the Antelope Creek crossings of the Blaine Canal very different from the plans and specifications; the latter called for four openings in the walls which would permit the floods of the creek to enter the canal whether or not any one was present, because [229] the openings were designed to stand open, never closed, and without gates, the lower edge being at the high-water line of the canal, so that if water came down the creek in a flood and could not otherwise escape, it would go through the openings into the canal; whereas, the water in the canal, if not above its natural high level, would not go into the creek.

The drawings also showed two other additional openings besides those four, connected with culverts or pipes under the canal to take care of the ordinary flow. These were to be controlled by gates, closing

(Testimony of Samuel Storrow.)

which the waters of the creek would rise into the canal. On the ground I found no openings above the high-water line of the canal, and instead of two there were four openings under the canal; and instead of a solid wall for the side of the canal two openings were introduced going to the bottom of the canal and bearing no relation to the purpose or method of the opening shown in the drawing. Those openings would have to be closed to have water in the canal; they would have to be open to take care of the flood water; and then they would not do it unless the water in the canal was less than that in the creek. The four openings upon the drawings designed to be above the water of the canal were 6 by 6 feet; the effectiveness of this structure was entirely destroyed; it was [230] essential that it should be built to accommodate itself to the varying flow of Antelope Creek, which was known to vary suddenly; it was necessary that the structure should be automatic because it is hard to get at. The result of this construction is that the structure was wrecked at the Antelope crossing; that would be the natural effect and what one would expect.

The heads of all the drops in the canal had clear openings; no piers except one which had two; the drawings show that all those heads should have four piers; they are designed to support flash boards, or temporary or even permanent gates; this is to keep the water in the canal, to keep it better soaked up and make greater convenience in regulation; sometimes to raise it sufficiently to get water out of the

(Testimony of Samuel Storrow.)

lateral gates, and then as a matter of emergency to shut off the flow from the canal to repair. Such a device is absolutely necessary; for an irrigation canal it is frequently necessary to build new head-gates to take water out of the new place; and accidents occur which require repair and then the water must be held back; also the water must be kept at a certain depth so as to flow out at laterals, and to prevent the burrowing by animals which, if the canal went dry, would be disastrous.

It would cost \$100,000 to rebuild defective concrete [231] on the drops in canals; half of that would be for putting in those piers.

I examined the head work of the Blaine Canal; Exhibit 6 is the drawing for that; the structure does not accord with the drawings; the spillway intended to pass the floods is 125 instead of 150 feet; also, a wall shown as 7 feet high and 100 feet long from the intake towards the river separating the weir from the head-gates is missing; in place of it is the Darlington head-gate; also a mudway or gateway is built on the wrong side of the river farthest from the head-gates; that 125 foot weir is not sufficient for the floods; if the floods jump the bank they would wreck the structure; the 100-foot wall was designed to keep the flood far away from the head-gate so that if a break occurred from excessive water it would not take out the concrete work, which is very expensive; there is much greater danger of wrecking the Blaine head-gates than if the 100-foot wall were there.

(Testimony of Samuel Storrow.)

The object of the sluiceway or gate is to get rid of mud, ice debris, etc., and keep the channel scoured out in front of the gates; the bottom of the gateway into the Blaine Canal is materially lower than the crest of the spillway; therefore, it is necessary to have this mud-gate; the gate on the other side of the river, so far as getting rid of mud [232] and debris, etc., has no use; it is too far away; it would tend to make quiet water where we don't want it; its effect is the opposite of what it should be.

Having the head-gates of the Darlington Canal adjacent to the Blaine head-gates is an element of weakness; it is not as strong as a concrete wall; it makes a current of water alongside of an important structure; it is a very great defect and adds an element of danger, whereas a high wall would be a great additional safety.

Exhibit 10 shows the bifurcation of the Blaine Canal; it does not accord with the plans; the gateways from the Blaine Canal and Blaine stub leading to the river should be 6 feet by 9 feet 1 inch, unobstructed by concrete; whereas it was built with a curtain of solid concrete closing half the opening, thereby effectively reducing the waterway and changing its use. According to the design gates should have been dropped into the waterway which filled the canal to high-water line and left openings above; this applies to both gates—the one leading to the Era Canal and to the stub; with that construction, if a great amount of water flowed suddenly it would automatically pass over the gates without damage; as

(Testimony of Samuel Storrow.)

now constructed the wooden gates fill the openings so that in case of flood the water could not escape without breaking the structure. [233]

When I was there I found this structure seriously wrecked; Exhibit 42 shows it; picture 43 shows the canal side of those works; the water is shown covering about half of the wooden gate; according to the drawings there were to be no curtain walls above those wooden gates; Exhibit 42 shows the wreck of the stub. I satisfied myself that the wreck was caused by the water breaking over the wall of the Blaine Canal, due entirely to the presence of the curtain walls.

Exhibit 44 shows right back of the Big Lost River where the dam abuts against the limestone cliff; it shows the pools of water where the leakage occurred. I took all the photographs except the four which were shown with reference to the virgin surface of the ground, and the two marked 25 and 26; they accurately represent the conditions at that time.

Cross-examination.

I am forty-seven years of age; I graduated from both Harvard University and Massachusetts Institute of Technology; lived in the west twenty-seven years; now live in California; have lived in Washington, Idaho, and Colorado; never established a legal residence in Idaho; have been here a total of several months. My duty has usually been to see [234] that the work was in conformity with the plans, and, if not, to make a fuss. I cannot tell what Drummond's position was from what he said; I have occu-

(Testimony of Samuel Storrow.)

pied either his or a higher position in every case; I understand he was not permitted any initiative; he would come under the general title of resident engineer to carry out the design made by somebody else; I have been resident engineer many times; in Yakima and Colorado and in California a great many times; while so acting I have quite often changed the work; my authority to make this was always in writing.

Q. Occupying the position that Mr. Drummond did on this work, if he saw that a change would be beneficial to the project and submitted it to his superior, and his superior approved of it, then would Mr. Drummond have authority to direct the contractor who was doing the work to make those changes?

Mr. POWELL.—That is incompetent, and calls for a conclusion on a matter on which the witness has not qualified as an expert. It would be only a conclusion of law.

Mr. RUICK.—Also assuming a state of facts not in evidence.

A. Taking the exhibits in this case as shown,—and I cannot disabuse my mind of their existence—I should say unqualifiedly that Mr. Drummond had no right whatever to vary from an order to Mr. Corey, no matter how the order was given to him.

Q. I am not asking you to draw conclusions, Mr. Storrow. A. I thought you were.

Q. Will you please answer my question now?

A. Will you read the question, please.

(Last question read.)

Mr. MILLER.—I wish to object to that further

(Testimony of Samuel Storrow.)

as not an expert engineering question but as a legal question.

A. I have got to give an opinion. [235]

Mr. HENDERSON.—You can answer that question yes or no.

A. No, sir, I cannot. My nearest answer would be no, but that is not exactly explanatory, nor is it my full answer, nor do I consider it a proper answer; it would be misleading, whether I answer it yes or no, utterly misleading.

I have known Harrison B. Riley for a year; I have the letter of employment and will produce it; he employed me to take a set of plans of reorganization which they had drawn up, a financial scheme of reorganization of the Big Lost River project, to examine the structures at Mackay, get any other information I could, and advise them whether that plan of financial reorganization could be carried out with the amount of funds which they thought they could get; I had the great mass of the plans of the Arnold Company; I had some of them on the ground.

I decided that the dam as it stood could not be completed on those plans, drawings and specifications I examined the plans and specifications prepared by the Arnold Company; after I got on the ground with those plans and specifications I found that a safe dam could have been constructed according to those plans and specifications, emphatically. The plans call for a core-wall to an impervious strata; it was not so built at any of the places where I examined; the two pits I dug were somewhere near

(Testimony of Samuel Storrow.)

station 13 plus 50. I found that the characteristics of the cone on which the core-wall was built were similar to the material in the gravel pits; the pits were dug 20 to 25 feet; I don't know how far below the core-wall; the core-wall as built is not sufficient in my opinion; I don't know whether I said anything about that to Mr. Riley; it was not material to my report which was made for a different purpose. I made a verbal report to Mr. Riley prior to my written report; I may have put some facts in the verbal report that I did not incorporate in the written report, [236] being about a month apart. In my written report I made it clear that it was impossible to use the core-wall and the work around it and I told Mr. Riley that those specific things which you say he asked for could not be done. Mr. Riley did not specifically ask me whether the dam could be completed so it would be safe; his questions were, could I take a certain amount of money and carry out a certain scheme; my reply was, "No," and in the process I said the dam could not be continued in his scheme; my written report was very long; I have the report here.

Q. In your written report you made the intention clear, didn't you? A. I tried to.

Q. And you told Mr. Riley in that written report that the work that had been done there was absolutely useless?

A. I do not remember those words. I told him it was useless for the purpose of carrying out the scheme which he asked me to attempt to carry out.

(Testimony of Samuel Storrow.)

Q. Well, didn't Mr. Riley ask you whether certain things couldn't be done to the dam that was already partially erected so as to raise it up and make it a complete dam? A. Yes, sir.

Q. What did you tell him?

A. I told him that those specific things which you say he asked for could not be done.

Q. Then, I understand from you that you made a written report to Mr. Riley that this dam could not be completed so that it would be safe?

A. Is that a question?

Q. Yes, you can answer that yes or no.

A. I do not remember. That question is too much—

Q. Will you look over your report? You have it in [237] court, haven't you?

A. That question is different in form from the way in which Mr. Riley's question came to me, and therefore I cannot answer it yes or no. Mr. Riley's questions were, could I take a certain fixed amount of money and carry out a certain fixed scheme. My reply was that I could not, and in the process of that reply I replied that the dam could not be continued into his scheme, could not be used as part of his scheme, and completed.

Q. Is that report in writing?

A. It probably is in the report—I don't know; it certainly was in the verbal report.

Q. You have got that report right here?

A. It is a very long report.

Q. Will you answer one of my questions directly?

(Testimony of Samuel Storrow.)

Have you got that report here? A. Yes, sir.

Q. Have you got that report here?

A. Yes, sir.

Q. Will you let me look at it?

A. No, sir.

Q. Why won't you let me look at it?

A. Because it was written for a client, and contains matters entirely distinct from construction, and matters of finance and credit, concerning a certain financial scheme to be carried out, matters which I do not consider in any way pertinent to this case, and all strictly confidential.

Q. Will you look at that report then and find out whether you made any report to Mr. Riley whether this dam as partially completed could be completed and used as a dam?

A. I can answer your question sufficiently without looking at the report by saying that I reported to Mr. Riley that this [238] dam could not be completed as it then stood and be a safe dam within the amount of money which he felt we could raise for the project, not that it couldn't be theoretically done, but merely that, with the amount of money on hand, it couldn't be done, and with that understanding I answer your question that I condemned the dam as incapable of being finished.

[Testimony of Paul S. Roberts, for Defendants.]

PAUL S. ROBERTS, a witness duly called and sworn on behalf of the defendants, testified as follows:

Direct Examination.

(By Mr. MILLER.)

I have been civil engineer for seven years; graduated from the University of Michigan in class of 1906, engineering department, and had practiced engineering before then. I am now deputy under the Water Commission of the Second District of Idaho. In April, 1910, I was Carey Act Inspector; appointed by D. G. Martin, State Engineer, in April, 1910. He took office in the fall of 1909. While holding that position I had supervision for the State Engineer of the Mackay dam, from the latter part of April, 1910, until the spring of 1911, when I left that department. My duties were simply to overlook the construction of the work and report to the State Engineer, having familiarized myself with the specifications and plans on file for the dam, approved by the State Engineer's office, and report whether the work was done pursuant to those plans and specifications. I did investigate the dam during its progress; some of the structures had been completed when I went on the work and the dam was partly completed. I observed that the dumping from trestles varied from the specifications in some instances; there was one diagonal cross trestle crossing the core-wall built during my time; I took photographs for the purpose of illustrating the variations from the specifications, to

(Testimony of Paul S. Roberts.)

illuminate my reports. I photographed that diagonal trestle [239] built while I was there; it is shown by photograph marked 41; it shows the first train of cars dumped from that trestle; that was dumped diagonal to the core-wall; I notified the State Engineer, and that that was in conflict with the plans and specifications; I also notified the engineer of the dam, Mr. Jones, to the same effect and requested that he discontinue the use of the trestle for that purpose; he agreed to do so temporarily, but he afterwards resumed without permission from the State Engineer's office.

I made a rough estimate with my eye as to the amount of dumping in the dam from tracks diagonally crossing the core-wall that I saw, and it would exceed 10,000 yards.

Photograph 38 was taken by me; it shows the section of the dam looking over the core-wall; also a part of the reservoir; one trestle in the lower toe and the lower borrow-pit; this photograph was taken in May or June, 1910; Photograph 41 was taken in July, 1910.

(Photographs taken by Roberts from 46 to 65, inclusive.)

45 shows dumpings from a trestle in the lower toe; the dump is in the natural angle at the toe; 65 shows an uncompleted trestle crossing the dam diagonally; the angle of the slide is about 45 degrees; Exhibit 50 shows a train of cars dumping from a track parallel with the core-wall, towards it; the different parts of the core-wall [240] were bonded very well, those

(Testimony of Paul S. Roberts.)

that I saw; the water was coming through in various places due to the coarser materials of the concrete having gathered and the finer material not having filled the joints.

The effect of the dumping from diagonal tracks was that the slide was sometimes away from the core-wall and at other times towards it. The dumping from the high trestle resulted in almost perfect separation of material—the heavier to the bottom; that made a very good passage for water through the embankment; the puddling being done there was not sufficient; it was quite a fair sized stream for ordinary sprinkling; it did not materially affect the slope of the embankment; I reported that the puddling was insufficient.

Picture 62 shows the lower side of the core-wall and the water coming through from the reservoir above the dam; it came through the fill of the dam before it reached the core-wall, a distance of about 200 feet; there was a head of 4 or 5 feet in the reservoir then; at that time there were 10 second feet going through.

For the concrete they were using the gravel and sand as it came from the pits; took it out of the dump; picture 59 shows that.

Picture 54 shows the stream used for puddling as it [241] was when I saw it. Picture 63 is a view of the outlet tunnel for controlling works and of the supply tunnel through the rock, built with steel pipe covered with a foot of concrete; the foundation is supposed to be solid rock from the specifications;

(Testimony of Paul S. Roberts.)

good construction required it; it would not be a good job without; when I was there there was always more or less vibration, depending upon the flow; that led me to suspect poor foundation; I spoke to Drummond and he said it was founded on solid rock; but afterwards the water washing through the valves cut out below the bottom of the cutoff wall, and showed that the wall was not on solid rock, but on slide rock from the cliff; picture 64 shows that.

Under the trestle which crossed the dam on the diagonal the ground beneath the fill was not plowed just previous to dumping; it was very smooth; I saw grass, indicating virgin soil.

Picture 39 shows it at the left; the rock excavated from the cliff showed in the body of dam within 25 feet of the core-wall.

Picture 60 shows the larger rock which separated from the fine and went to the bottom; that large, coarse material is 6 or 8 feet from the core-wall.
[242]

The rock excavated from the cliff was deposited in the body of the dam within 25 feet of the core-wall. Picture No. 60 shows the coarse material within 6 or 8 feet of the core-wall. The spillway is not an open cut as shown on the plans but a tunnel. Picture 55 is a view of the reservoir. The sage brush and debris was not removed from the bottom. Picture 56 shows a portion of the reservoir above the toe of the dam. The debris clogged up the opening of the tunnel and they had to jerk out the grating. The specifications called for riprap on the upper face. The upper face

(Testimony of Paul S. Roberts.)

was not tamped. It was dressed to slope with hand shovels. Without this tamping as soon as you get water on the face you get a settlement which will cause the concrete to crack.

Picture 49 shows the downstream side of the head-gates of the Blaine Canal. The gates are steel and all but one in place. Picture 48 shows the lower side of the Blaine stub of the bifurcation works before it was wrecked. Picture 47 shows the headworks on the Blaine stub and on the Era Canal and the curtain walls. Picture 46 shows drop No. 9 on the Blaine. Martin, State Engineer, is in the picture. He kicked some of the concrete out with his heel. It had been in place two months or more. These various photographs correctly represent the situations at that time.

As the result of my findings and report, Martin notified me to request the engineers in charge to voluntarily close down on the following Saturday and if they refused, I was to notify Martin and he would take other measures. Pursuant to the telegram I requested the work to be stopped.

On the upper face of the dam the ground did settle and there was decided cracking of the concrete. I reported the tunnel instead of the open cut for the spillway; that was almost completed before I went there; therefore I made no objection.

At one time I reported that the seepage through the [243] embankment of the dam was 50 second feet on June third, when there was only a few feet of water in the reservoir. That was correct. On July 6th I requested that the dumping from the diagonal

(Testimony of Paul S. Roberts.)

fill be stopped. It was resumed on the 14th.

On July 30th I reported that the contractor was not plowing the virgin surface of the ground prior to filling at the bottom; also that the supply of water was wholly inadequate to cause proper puddling of the wetted zone; also that Film 7, Roll 3, shows that the embankment was not puddled, though within the "puddled" zone; also that the puddling was not sufficient to stop the flow of water through the embankment as shown by the stream on the photograph; also reported on the same date that on account of the length of the slope the stream of water used for puddling is too small to give any puddled condition at the foot of the slope.

November 14, 1910, I reported water flowing under the core-wall five cubic feet per second in one well-defined channel, then turning at right angles and flowing parallel to the wall beneath the gravel, coming out of the lower side of the wall. The water issuing from the lower side has sufficient force to agitate the gravel in the bottom of the spring so violently that the noise can be heard by one standing on the core-wall above the spring; that the passage of the water underneath was shown by putting coloring material above which came out below the wall two and a half minutes later. I reported the sheet piling did not extend to an impervious stratum, that under a head of only seven and a half feet the water found a channel beneath the core-wall, that a greater head of water would cause serious damage.

The conditions were correctly stated. (Telegram

vs. Corey Bros. Construction Company et al. 273
(Testimony of Paul S. Roberts.)

of Martin offered in evidence, also letter of July 22, 1910, by Martin to Roberts; also the resolution of the State Land Board [244] reciting that the Construction Company constructing the dam is not complying with the specifications of the contract with the State; that the company has failed to comply with the numerous requests to correct the work, and ordering the work to be discontinued until constructed in accordance with the contract and that no further sale of water rights be made.

Cross-examination.

My reports were made to the State Engineer and became public files. I am now 31 years of age. I was five years in the Michigan University. I took five years to do the course because of absences in actual practice. The first irrigation project I was on was in the fall of 1908 in Blaine County, Idaho, as engineer on construction. I was the only engineer. There were about 50 miles of canal and 15,000 acres. Half the system was built before I went there. I built most of the canals and some of the controlling works but not the dam. I worked there three months. Before 1908 I was in the building business in New York as an engineer. After this irrigation work in Blaine County I was drawing plans in Oregon for an irrigation system for the Arnold Company of Chicago, also was chainman. George H. Binckley was my superior. [245]

Part Cross-examination of Roberts.

In March, 1910, I became Carey Act Inspector for

(Testimony of Paul S. Roberts.)

Idaho and worked until August 1, 1911. I was over the Big Lost River Irrigation Project to see that the contract as made with the State of Idaho was complied with. I don't know who was the engineer in charge for the Big Lost River Irrigation Company. I recognized Mr. Drummond as the engineer in the field. Whether he was in charge for the Company or not, I couldn't say; I didn't pay any attention to that; I didn't care. I recognized him as being there having charge of that work. I never considered the relative authorities of the various engineers on the project. (506.)

The other engineers were in charge of the various divisions of the work; I considered Mr. Drummond in the field. I looked to Mr. Drummond as being the chief engineer as far as the work there on the ground was concerned. If there was any protest to be made, I made it to Mr. Drummond if he was present at the time and place; if not, I made it to the engineer in charge of the particular work at the particular place. I remember of making a protest to Mr. Drummond about the crossing the fill on a diagonal track. I told him it was contrary to the specifications, as I understood them. I don't recall as to giving it to him in writing. I don't remember what he said; he didn't stop. (507.)

I talked with him about it. I don't recall the conversation. I didn't pay much attention to it except to protest. I don't recall whether he said anything about what he would do. I don't know whether he refused or not; he did not advise the work to be

(Testimony of Paul S. Roberts.)

changed to conform to the specifications. I knew the contractors that were working there, Corey Brothers Construction Company. There were no subcontractors at the dam. (508.)

The only crossing I referred to as being contrary to specifications [246] was the fill crossing the dam. There were undoubtedly many minor points that we spoke about at that time; nothing of any large importance. I wasn't there every day. I had other territory to look over. I made a report to my superior, the state engineer. (509.)

It was on the 27th day of April, 1910. (Witness shown a document and identifies it as his report of April 27, 1910.) In that report, I said: "I submit herewith a report on the Big Lost River Land & Irrigation Company's project." By that, I meant the dam that was being constructed below Mackay. (510.)

In that report, I further reported: "*At the Mackay dam.* The concrete around the controlling valves at the outlet end of the tunnel is completed. It is free from cracks and checks and finished in a thorough and workmanlike manner." That statement was true to the best of my knowledge at that time and I thought it was a pretty good piece of work. I further reported as follows: "There is to be a protecting shield of concrete over the valves to protect any rocks from above falling on to the valves. This shield has not been built as yet. The rocks above the controlling valves, which support the spillway channel, are badly cracked and fissured.

(Testimony of Paul S. Roberts.)

The water flowing out of the controlling valves will erode this bank and undermine the rocks above, endangering the spillway channel." This tunnel was not built according to the plans. I did not say in my report that it was all right. I knew the tunnel had been built before I got there or practically so and if it had been allowed to go on it was somebody else's business and not mine. I don't know that I expressed my opinion concerning that tunnel at that time. I was simply getting acquainted with the work and had not investigated enough to form any definite opinion as to the nature of the work. I don't know [247] that I knew that the plans and specifications did not call for a tunnel. I didn't have the plans and specifications there with me. (512.)

I had seen the plans and specifications in the State Engineer's office before going up, and I was under the impression that said plants and specifications would be at the job. I found that not to be the fact and could only make such report as was evident on the face of the work at that time until I should have the plans and specifications, before me. I was there to see whether the work was being done according to the plans and specifications that the Big Lost River Irrigation Company had with the State. I wasn't there to give instructions how the water should be dumped out of the spillway or how the tunnel should be run. In my report, I further said: "I would suggest that the present retaining wall of concrete on this side of the controlling valves be ex-

(Testimony of Paul S. Roberts.)

tended some fifty feet to prevent this erosion." There were no plans or specifications that called for that. It was my privilege to give these suggestions.

Q. I thought you were only to find out whether the work was being done according to plans and specifications, that you weren't to give any advice. (513.)

A. That is also true in part. We were always asked to give all possible information to our office; that was understood.

Q. Well, now, you say the plans and specifications didn't call for that at all. Did you want the State Engineer to have this company go to work and do something the plans and specifications didn't call for?

A. No, I wouldn't say that was true. We would only request or suggest that changes be made in the plans and specifications to fit the various conditions.

[248]

Q. So that those plans and specifications, as the occasion arose, should be changed, shouldn't they?

A. Not necessarily so.

Q. Then what do you mean by this (reading): "I would suggest that the present retaining wall of concrete on this side of the controlling valves be extended some fifty feet to prevent this erosion," if that wasn't in the specifications and plans? Why did you suggest—why did you write that?

A. I thought it would be a good thing to add to the plans and specifications.

Q. And to that extent you were changing the

(Testimony of Paul S. Roberts.)
plans and specifications?

A. I was merely suggesting it.

Q. I thought that you were not out there to make suggestions, that you were only out there to see whether the work was done according to the plans and specifications.

A. That was part of our office, yes, sir.

Q. Now, did you have some other duty to perform while you were there?

A. The duty of keeping our office fully advised as to the facts. (514.)

Q. And if you saw something that wasn't done, or that should be done that was not in the plans and specifications, you should make that suggestion?

A. It was in our province to suggest, if we saw fit, yes, sir.

Q. Was that in your orders?

A. So I understood, yes.

Q. How did you come to understand that?

A. In conversation with Mr. Martin before assuming the duties of the office. [249]

Q. Then, if you went out there and found that the dam wasn't being, or was being constructed according to the plans and specifications, but you didn't think it was safe, you could suggest what should be done to make it safe, is that it?

A. Perfectly proper, yes, sir.

Q. And you did? A. Certainly.

Q. So now I understand you had other duties besides those of simply finding out whether the work was being done according to the plans and specifi-

(Testimony of Paul S. Roberts.)

cations, didn't you? A. Yes, sir. (515.)

I further reported in my report as follows: "On April 26th, the water in the reservoir had covered an area of sixty to seventy acres, and the tunnel and controlling valves were flowing full. The water along the face of the dam had covered the concrete apron for a distance of 32', measured along the slope. As the water in the river is steadily rising it will cover more and more of this apron, preventing the placing of another layer of concrete to increase the thickness of the apron, as recommended. Horizontal cracks have developed in this concrete apron, at the water-line, and extend along the entire face of the apron. At the corner of the apron where it turns back along the east portal of the tunnel, there is a vertical crack extending from the water-line down the surface of the apron. The concrete on the dam side of this crack has settled below that on the portal side about four inches. This is due to the fact that the water getting under the apron at the bottom of the dam caused the material in the dam to settle away from the apron. This cracking and local settling of the facing along the dam, I do not consider serious, except that it indicates [250] the necessity of making this facing 6" thick as recommended in Mr. Fell's report of April 2, 1910." (518-19.)

I further reported in my report as follows: "Work on the spillway tunnel is progressing rapidly." The spillway tunnel is around twelve or fourteen feet from floor to roof. I don't know whether the top of

(Testimony of Paul S. Roberts.)

the spillway tunnel was four feet above the top of the dam. The plans and specifications didn't call for any tunnel at all. (522.)

Q. Did you make a report to the State Engineer that the Irrigation Company wasn't carrying out their contract with the State in this respect?

A. Not in that respect, no, sir.

Q. Why didn't you?

A. I didn't know that it was contrary at that time to the plans and specifications.

Q. Didn't Mr. Fell tell you that? A. No, sir.

Q. This was a pretty important matter, wasn't it?

A. It has since proven to be quite so.

Probably the spillway tunnel was of more importance to the structure than the underbrush out in the water. I did not know of my own knowledge that the top of that tunnel as constructed was designed to be four feet higher than the top of the dam. (523.)

Q. Continuing (reading): "Another gang of men is removing the earth and loose-rock down to the solid rock, where the core-wall joins the cliff at the west end of the dam. This work is also progressing as rapidly as possible. The contractor is working continuously with a day and night shift.

"*At the Diversion Dam, Above Darlington.—*
[251]

Mr. POWELL.—Let me ask you, Judge Henderson, do you understand that to mean that the contractors are working continuously day and night shift at the—

Mr. HENDERSON.—No, he is starting off on a

(Testimony of Paul S. Roberts.)

new subject now. (Continuing.) "Three men are working here, placing the controlling gates. There were also three men removing the forms from the concrete of the Darlington head-gate. This force will have to be increased if these controlling works are to be completed before water is turned into the canal May 1st. The iron work for the Darlington head-gate has not arrived at the site. All the controlling mechanism at this point should be in place and tested before water is turned on. After water is turned on, it will be impossible to make any changes or adjustments without making a temporary opening in the levee, which should be avoided if possible.

"*At the Diversion Dam, below Powell.* No work is being done on this structure at present. The rock excavation for the main canal below this dam is about completed, and only a small part of the concrete work at the head-gates has been completed."

At the time when you was there was the work being done all right and according to the plans and specifications?

A. You are speaking now of the head-gate below Powell?

Q. Yes. A. Yes, sir, it was.

Q. Now, there is another subject: "*Canals and Structures Blaine and Era Canal.* The Blaine and Era Canals are practically finished. The tunnel on the Blaine Canal is in the same condition as when last reported." Do you refer to any report you had made there? A. No, sir. [252]

(Testimony of Paul S. Roberts.)

Q. Mr. Fell's report? A. Yes, sir.

Q. (Reading:) "The drops are about finished. On drop #9, the first drop north of the tunnel on the Blaine Canal, the concrete is being put in without any reinforcement. Parts of the concrete show cracks, due to too rapid drying. I instructed the engineer on this work to keep the concrete moist, allowing it to dry slowly and prevent cracking. I called Dr. Drummond's attention to the fact of the concrete being put in without any reinforcement, and he said he had sent reinforcing material to the site, with instructions for it to be used in the work." Do you remember what engineer was doing that work—not what engineer, but what contractor besides Corey Brothers Construction Company—they were the original contractors.

A. My memory is that it was a firm by the name of Falk & Childs.

Q. Feckle & Childs?

A. I thought it was Faulk (spelling the word) & Childs, as I remember it; I wouldn't be sure about that.

Q. Were they subcontractors under Corey, do you know?

A. I don't know; I understood they were.

Q. Feckler & Childs?

A. I wouldn't even know if it was spoken, to be sure.

Q. You called Mr. Drummond's attention to that, didn't you? A. Yes, sir.

Q. You didn't say anything about it to the sub-

(Testimony of Paul S. Roberts.)

contractor? A. Oh, no.

Q. Why didn't you?

8. The subcontractor wouldn't have taken any instructions from me, if I had any authority to give it to him.

Q. You went to the man in charge of the works according to the [253] contract with the State of Idaho, didn't you?

Mr. POWELL.—Objected to as incompetent, and calling for his conclusion.

Mr. HENDERSON.—Q. That is to say, you thought when you were speaking to Drummond that you were talking to the man that represented the Big Lost River Irrigation Company?

Mr. POWELL.—Objected to as incompetent, calling for his conclusion, and immaterial, what he thought.

Mr. HENDERSON.—Q. Didn't you?

A. He represented them in the field, yes, sir.

Q. (Reading:) "The concrete was being placed on the solid ground without any provision being made for drainage." Do you know whether the contract called for that or not? A. No, sir.

Q. Or the plans and specifications?

A. I don't, no, sir.

Q. Whether they did or not, you thought drainage ought to be put there, didn't you? A. Yes, sir.

Q. (Reading:) "A gravel foundation should be laid first, and the concrete then placed. I also called the engineer's attention to this matter." Now, do you remember what engineer that was?

(Testimony of Paul S. Roberts.)

A. No, sir, I do not.

Q. Well, do you think it was Mr. Drummond?

A. It was not Mr. Drummond.

Q. Mr. Huff? A. Not Mr. Huff.

Q. You know both of those gentlemen, do you?

A. I do, yes, sir. [254]

Q. So when you say the engineer here, you don't know which one?

A. There was some subordinate in charge of that work, and I don't know his name.

Q. What did he say to you?

A. I don't remember as to that.

Q. Did he refuse to do it?

A. Evidently not, or I would have noted it in the report.

Q. Will you say now that because you didn't state it in the report he didn't refuse?

Mr. POWELL.—That is objected to as calling for a conclusion, and incompetent and immaterial.

A. Undoubtedly he made no comment except that he would take it up probably with his superior, in which case there would be no mention made one way or the other in the report, which would be perfectly proper to do on his part. (530.)

I further reported: "The concrete syphons on the north and south forks of Antelope Creek crossing are finished. The forms are removed from the concrete on the north fork crossing, and partially removed on the south fork crossing. Temporary gates are installed in both syphons."

Q. Have you got a photo of that?

(Testimony of Paul S. Roberts.)

A. I don't believe there is one in this set that I have in my hand.

(Mr. Powell exhibited photograph to witness.)

A. (Continued.) This is one of the Antelope crossings.

Q. Did you introduce a photograph like that in evidence?

A. Not like that. There is one taken by Mr. Storror that is practically the same thing, shows the same thing.

Q. Do you remember what exhibit that was?

Mr. POWELL.—Mr. Storror can find it, no doubt.

[255]

Mr. HENDERSON.—Let me see it.

(Mr. Storror handed photograph to Mr. Henderson.)

Mr. STORROW.—There is the other side of it.

Mr. HENDERSON.—Q. I show you Defendants' Exhibit No. 12. See if that is the structure that you referred to in your report that I have just read.

A. That is one of the crossings; I couldn't be sure as to whether it is the north or the south fork, however; they are very similar.

Q. There was nothing there that you disapproved of, as Carey Act Inspector, was there?

A. That crossing had been completed, and it would have been useless to have found fault with it at that time, the first inspection; these would all come later.

Q. Did you ever make a report saying that that was not in accordance with the plans and specifications? A. I think not; no, sir.

(Testimony of Paul S. Roberts.)

Q. You thought that was all right, didn't you? (531.)

A. I never compared it with the plans and specifications; I had no notion whether it was or was not. It was completed.

Q. Well, it looked good to you, as an engineer, didn't it? A. The concrete looked good.

Q. The plan down there looked good, didn't it?

A. I never considered it at all, didn't think anything about it; I was busy with other matters.

Q. That was what you were down there inspecting it for, to see whether it was done according to the plans and specifications.

Mr. MILLER.—Objected to for the reason that it is arguing with the witness.

A. This was not being done; it was already done.

[256]

Mr. HENDERSON.—Q. Did you have any fault to find with it, as Carey Act Inspector?

A. I had nothing to say about the finished products; they were completed before me—the man before me, it was his business to look into those.

Q. If it hadn't been completed according to the plans and specifications, should you have called the state engineer's attention to it?

A. No, not in a finished structure, I wouldn't have gone to the trouble to find out; there were so many live wires going.

Q. Then do you mean to say, Mr. Roberts, that after the dam had been finished, if it was not finished according to the plans and specifications, you

(Testimony of Paul S. Roberts.)

wouldn't have called the state engineer's attention to it?

A. If it had been finished, I wouldn't have been there as an inspector.

Q. Supposing you had been sent over there even after it was finished, would you have found any fault with it? (532.)

Mr. HAGA.—Objected to as improper cross-examination and mere supposition.

A. In that case I would have been advised to report on its conforming with the specifications.

Mr. HENDERSON.—Q. Wasn't that a part of your duties when you went along down that canal and you saw some work completed and it was not in conformity with the plans and specifications, to notify the state engineer?

A. No, sir, not that had been done previous to my advent on the work.

Q. (Reading:) "The embankment extending from the wing walls along the banks of the creek are roughed in at the North Fork [257] crossing and only begun at the South Fork crossing. This work can be finished at any time. For characteristic view showing conditions at both crossings see Photo #8, Roll #1." Have you got that photo here?

A. I have not; no, sir.

Q. I think we had a photo introduced, did we not? (Reading:) "The 4' syphons for the crossings of the five Darlington ditches are completed; also all bridges on this canal."

Mr. HENDERSON.—Weren't those syphons

(Testimony of Paul S. Roberts.)

there in controversy here with Mr. Storrow? Didn't you introduce a picture here showing that?

Mr. MILLER.—Yes, the same thing that has just been shown here, the picture on the other side of it, showing the other side.

Mr. HENDERSON.—Q. I show you, Mr. Roberts, Defendants' Exhibit No. 15. When you made your report on April 27th was that work completed like that?

A. With the exception perhaps of the installing of the windlasses. (533.)

Q. But outside of the windlasses the work had all been done? A. Yes, sir.

Q. Did you look that over carefully?

A. Yes, sir.

Q. And what place is that on the canal?

A. That is the diversion dam and spillway at the head of the Blaine Canal.

Q. And what is this opening over here?

A. That is the sluice-gate, the waste-gate.

Q. That is to draw the water back away from the gates of the canal?

A. That is to let out material that wouldn't go over the [258] weir and that you don't wish to go into the main canal—not necessarily draw the water away from the gates.

Q. You thought, as Carey Act Inspector, that that was all right, didn't you?

A. That was also completed when I went on to the work.

Q. Did you try to find out whether that was com-

(Testimony of Paul S. Roberts.)

pleted according to plans and specifications?

A. Not at all, no, sir.

Q. But it did look all right to you as an engineer?

Mr. MILLER.—That is immaterial.

A. The concrete looked good. I didn't even pass judgment on it in my own mind, as to its engineering features.

Q. Will you look at it now after this long and see what you think about it, as an engineer?

Mr. MILLER.—Objected to as not cross-examination.

A. Other witnesses have testified on the stand that it was not.

Mr. HENDERSON.—Q. I am not asking about other witnesses; I have heard the other witnesses.
(534.)

A. I wouldn't feel competent to contradict their statements.

Q. Have you any independent judgment of your own? A. Yes, sir.

Q. What do you say, of your own judgment?

A. It was very nice concrete.

Q. What do you say about putting the waste-gate where it was, or where it is now?

A. It seems highly impracticable on that side.

Q. Why didn't you report that to the state engineer, then? A. It was already there.

Q. That is true, but you were down there to inspect, were you not? [259]

A. I wasn't down there to tear down structures and rebuild them.

(Testimony of Paul S. Roberts.)

Q. No, but when a structure was not completed according to the plans and specifications, didn't you consider it your duty to call the attention of the State Engineer to it?

A. I never compared that structure with the plans and specifications.

Q. But in the first part of your report you didn't hesitate to make suggestions about the spillway, did you, about the water when it went through the spillway or tunnel? A. I did not, no, sir.

Q. And when you saw something that needed doing differently from what the plans and specifications called for, you called it to the State Engineer's attention, didn't you, in this very first part of your report that I have read to you?

A. In the nature of an amendment or addition, not perhaps different from the plans and specifications.

Q. All right; when you saw anything wrong, you thought it was your duty to call it to the State Engineer's attention, didn't you? (535.)

A. Yes, sir.

Q. You didn't see anything wrong when you went down there to where the Blaine canal is, did you?

A. This one, you mean?

Q. Yes, sir. Is that the Blaine?

A. This is the Blaine, yes, sir.

Q. Yes.

A. I didn't know that was different from the specifications; I didn't compare it with the plans.

Q. I am not asking you that, but I am asking you if, when you were there, it looked all right to you,

(Testimony of Paul S. Roberts.)
as an engineer? [260]

Mr. MILLER.—He has answered that, and said he didn't consider that thing at all.

A. I didn't analyze it.

Mr. HENDERSON.—Q. If it does not look good to you now from an engineering view, did it look good to you then?

Mr. MILLER.—He has answered that three or four times, and for that reason I object.

Mr. HENDERSON.—I want him to answer my question direct.

Q. Why were you considering other features in connection with that structure and calling the State Engineer's attention to them, and then didn't call his attention to something you say isn't right now?

A. What I know to be right now, and what I knew to be right then—

Q. Are two different matters?

A. Are entirely different.

Q. Is that because you have heard other engineers testify? A. No, sir; not necessarily. (536.)

Q. What has happened besides the testimony of other engineers to change your mind, if you have changed it?

A. I don't know that I have changed my mind in the matter.

Q. But you seem to have,—you seem to have a different opinion now than what you had when you were down there, is that true?

Mr. MILLER.—Objected to as not being based on anything the witness has said in any way, shape or manner.

(Testimony of Paul S. Roberts.)

A. In some cases you speak of, I had not formulated an opinion; therefore, I could not have changed it at this time.

Mr. HENDERSON.—Q. (Reading:) “The Powell Tract. The main canals are nearing completion rapidly. Work is progressing rapidly on the drops, [261] which will be finished by the time the canals are finished. None of the smaller laterals have been begun. At station 330 on North Canal, the canal runs through a rocky point. The top of the rock is about two feet below the surface of the ground, and extends down below the grade of the canal. This formation is full of holes and fissures and when these are opened by the blasting there is a strong current of air down into the rocks. This would indicate the presence of a cavern or passageway below the surface. This formation extends for 321' along the canal and will need to be lined with concrete. Photo #9, Roll #1.” Did you bring over a photo of that, Mr. Roberts?

A. No; that probably didn’t come out right either in the taking or development; that is why it is absent from the report.

Q. (Reading:) “The entire work is progressing as rapidly as possible and with the exceptions noted is in good condition. The canals will be ready for water at the specified time.” Then there are two other pages. The one refers to the working force on the project, which is page 8, and on page 9, without reading it, “I am mailing under separate cover one roll of films,” and then naming them. That con-

(Testimony of Paul S. Roberts.)

stituted all of your report of April 27th, did it not? (537.) A. So far as I know, yes, sir.

Q. Now, do you remember when you made another report?

A. It was about a month later; I couldn't recall the exact date. (538.)

On May 20, 1910, I wrote a letter to the Hon. D. G. Martin, State Engineer, which reads as follows:

"Sir:

I have been unable to locate a set of the specifications stamped with the State's approval, for this work of the Big Lost River project. Mr. Drummond, the engineer on the work, has told [262] me repeatedly that they were somewhere on the work, but my efforts have been unable to locate them. In view of the many rumors current here of injunctions by the railroad company and others stopping the work on account of its being dangerous to property in the valley, and the general fear of the community, I believe the above specifications should be here and always available; in order to protect the State I think it advisable to stop the work if necessary till the specifications are produced, and I ask for authority to do this. Mr. Drummond contemplates a change in the construction of the core-wall which does away with the sheet steel piling in the last fifty feet of the wall, and instead of the piling excavating to a depth of ten or twelve feet before placing the concrete. The reason for this change is that the boulders prevent the driving of the piling. I believe it to be better construction to continue the steel pil-

(Testimony of Paul S. Roberts.)
ing as originally planned, and remove all boulders until the piling will drive to place. I told Mr. Drummond that I would not assume the authority for the change, and for him to submit the change of plan to you for your approval before going ahead. Respectfully," That was signed by you? A. Yes, sir.

Q. As Carey Act Inspector? (539.)

A. Yes, sir.

Q. So you had a talk with Mr. Drummond about driving steel piling? A. I did.

Q. And you told him that he had better talk with the State Engineer? A. Yes, sir.

Q. Now, it would seem that up to this time, you didn't have any plans or specifications of the work?

[263] A. Is that a question?

Q. Yes.

A. We did not have at the dam, or in their Mackay office there were no plans or specifications of the work. There were plans and specifications, but, as Mr. Drummond said, they were somewhere, but I wanted them where I could see them myself, on the work.

Q. Well, I don't quite understand this part of your letter then: "I have been unable to locate a set of the specifications stamped with the State's approval for this work of the Big Lost River project. Mr. Drummond, the engineer on the work, has told me repeatedly that they were somewhere on the work." Did you have any specifications there that were not stamped with the State's approval?

A. I believe there was a plan, yes.

(Testimony of Paul S. Roberts.)

Q. That is what I wanted to find out. Now, what was that plan?

A. As I remember, it was a general plan of the dam only.

Q. Like these blue-prints that have been introduced in evidence?

A. It was a big blue-print, yes, sir; I don't know whether there is one here like that or not. (540.)

On May 27, 1909, I made another report to the State Engineer, which reads as follows:

"Hon. Daniel G. Martin, State Engineer,
Boise, Idaho.

Sir:

Herewith I submit report on the Big Lost River Irrigation Co.'s project:—

At the Mackay Dam.

The first, or foundation, section of the concrete [264] core-wall, across the old channel of the river, is completed to within 100' of the west end of the dam. Before the concrete was placed, the earth in the forms was excavated to a firm foundation, which was from 5 to 7' below the top of the sheet steel piling. This allowed the concrete to make a firm band with steel piling. There was several feet under water but no flow, in the forms at the time the concrete was put in. The placing of the concrete began at the end of the section where the old concrete had stopped, and the new concrete was pushed down the slope of the old concrete into the water, continuing in this manner to the end of the forms. This method prevented any separation of the cement and gravel in

(Testimony of Paul S. Roberts.)

the concrete. At the center of the old river channel temporary openings are left in the core-wall. These openings are one square foot in area and spaced vertically two feet apart. This is to allow a passage-way for the considerable amount of water that seeps through the gravel embankment in front of the core-wall. This water is now diverted around the core-wall. The second lift of the core-wall is being placed as rapidly as the foundation section has become hard. Two concrete mixers are being used and the (543) work pushed as rapidly as possible.

Film #5, Roll #1 shows the form work and concrete on this section of the core-wall.

A force of men is removing the earth and loose rock from the cliff where the core-wall will join the solid rock on the west end of the dam.

Work on the first and second lifts of the earth embankment in front of the core-wall is progressing simultaneously and as rapidly as possible. The first lift is nearly completed as far as the core-wall will allow, and the up-stream section of [265] the second lift is finished to within a hundred and fifty feet of the west end of the dam. Six gravel trains are now in operation on this work,—the sixth locomotive being placed in commission on May 17th.

Film #4, Roll #2, shows the work on this part of the construction, and Film #6, Roll #2 shows the method of transporting the sixth locomotive from Mackay to the dam.

The excavation of the tunnel section of the spill-way channel is completed. There remains about

(Testimony of Paul S. Roberts.)

twenty feet of open cut work to complete the entire excavation of the spillway channel.

A few small leaks have developed in the concrete at the outlet end of the tunnel at the controlling valves. These leaks apparently come from places in the joints of the steel pipe under the concrete, which were not caulked sufficiently tight. It is the intention of the company to do nothing toward stopping these leaks at present. When sufficient water has been stored in the reservoir to give the maximum pressure in the tunnel these leaks will be traced back to the joints and the joints properly caulked.

The iron trash rack at the intake end of the tunnel had to be removed on account of the large amount of brush which (544) collected. A temporary wooden trash rack has been built across the portal of the tunnel. One man is always on duty at this trash rack during the day, and two at night, keeping the brush removed.

Film #6, Roll #1, is a view of this rack. Film #6, Roll #2, is a view of the trees and brush in the reservoir, and Film #5, Roll #2, is a view of some logs and brush floated down to the dam. These views show the necessity of continuous duty at [266] the trash rack.

Work on the dam is progressing continuously day and night.

CANAL SYSTEMS.

The head-gates on the Blaine Canal at the diversion dam above Darlington are in operation. The gates are now raised six inches. A brush dam has

(Testimony of Paul S. Roberts.)

been built in the temporary break in the levee above the dam, which raises the water four feet on the gates, but not high enough to flow over the weir in the dam. There is now two feet of water in the Blaine canal.

The hoisting jacks which operate the gates are placed temporarily on large timbers over the gates and in front of the arches on which they are to be permanently placed.

Film #3, Roll #4, shows these hoisting jacks as now placed.

In the concrete arches, which will eventually carry these hoisting jacks, holes have been cut, through which the cables are to pass from the gates to the jacks. The only reinforcing material which shows in these openings is 6" mesh wire fencing. As these arches are very thin, if there is no other reinforcing material in them than this fencing, they will not be strong enough to carry the hoisting jacks and the weight of the gates. (545.)

A watchman has been permanently stationed at the dam.

All the structures on this canal are finished. Film #2, Roll #1, taken May 13th, in a view of Drop #9. This concrete work is very poor. It is rough and patched, and will easily crumble under the foot in some places. The other drops are in much better condition, and show good construction. Film #1, Roll #4, shows drop #9 on May 25th, with water in the canal. The water was washing the earth banks of the canal just below the drop, and these banks will

(Testimony of Paul S. Roberts.)

have to be riprapped. It is the intention of the company to place such riprap as will be found necessary, after [267] the canal has been in operation a season.

The portal walls at the lower end of the tunnel just below drop #9 are a shale and clay formation. These walls are nearly vertical, and show a tendency to erode. A very slight erosion would cause caving of the banks, and it will probably be necessary to line this section of the canal with concrete.

Some leaks have developed at these points along the canal where the canal passes through rocky points and the banks are made for the most part of the coarser material taken from these cuts. At one point this leakage was about one second-foot. Concrete lining of the canal will probably be necessary at these places.

On May 13th, the form work for the head-gates of Era and Lower Blaine canals was begun. Film #1, Roll #1 shows the starting of this work and Film #2, Roll #4, shows the finished concrete, with water in the Era canal on May 25th. This concrete is hard and uniformly good. The long drop just below the Lower Blaine headgate was being built. The finished part of this concrete is well done and showed good workmanship. No provision had been made in this 1400 feet of concrete chute for any expansion joints and Mr. Martin requested the engineer to put (546) in such joints where needed.

The excavation for the other three drops and for two private ditch syphons on the Lower Blaine Canal

(Testimony of Paul S. Roberts.)

is finished, but the concrete work on these structures has not been begun. The bridges over the canal are completed.

ERA TRACT.

The excavation for canals and laterals on the Era Tract is nearly completed. The material for the two flumes on this tract is being hauled from Arco, and the work of erecting the [268] flumes will begin as soon as the materials reach the site.

The concrete head-gates of the laterals are being built.

All bridges across the main canal are finished.

Water was turned into the main canal on May 20th.

ARCO TRACT.

The concrete work on the head-gate of the Arco Canal has not been started.

This canal crosses Spring Creek, at a point one quarter of a mile below the Head Gate. Film #4, Roll #1, shows the wooden culvert being placed at this crossing. This culvert is made of 2"x12" plank on 2"x6" uprights. There are no diagonal braces or stiffening of any kind. When in place it will be almost entirely submerged. An iron pipe culvert was originally planned for this crossing, but the engineer claims they could not excavate to lower the pipe below the bottom of the canal. By going to either side of the present point of crossing it would be possible to excavate for the placing of the pipe and for concreting of the ends. I would recommend that this be done later as the wooden culverts at best

(Testimony of Paul S. Roberts.)

will be but short lived. (547.)

Film #3, Roll #1 shows the temporary inlet into the canal, of private water. This is water belonging to some old properties under the canal, and is not of the company's filings. The constructing of the Arco Canal necessitated the abandoning of an old private ditch, in consideration of which the company has agreed to carry these private waters in its canal.

Temporary boxes and headgates of wood have been built on this canal. These are to be replaced later with concrete structures.

The one drop in the canal, and several of the bridges are not yet completed. [269]

The excavation and embankment along the canal has been left in a very rough and unfinished condition. At several places the canal has not been excavated to the required width. At two places, the banks are a foot or more below grade and for a distance of three hundred feet. It will require a good deal of work to bring this section of the work up to the standard of the rest of the project.

POWELL TRACT.

Carpenters have begun setting forms for the Head Gates on the North Canal at the Diversion Dam below Powell. Films #1 and #9, Roll #3 shows the rock formation and foundation for these gates.

Film #8, Roll #3 shows the first Drop below the head-gates as finished. The concrete in this Drop is good and the riprap well and carefully placed.

Film #2, Roll #3 shows drop #2. This drop is nearly completed. The rough spots in the concrete

(Testimony of Paul S. Roberts.)

are to be finished over by hand. The gravel and sand used in this concrete contains some loam, but the concrete seems hard and good.

Film #3, Roll #3 shows the form work in place at drop #3 (548) ready for the concrete. This drop will be finished after which the concrete at the head-gates will be put in.

Film #4, Roll #3, shows drop #4 and all other drops below #4 are in a similar state.

No concrete work has been done below Drop #3 on any of the structures.

None of the bridges have been built on this tract.

The excavation on the North Canal is finished for the first six miles. Below this point the canals and lateral are in various stages of completion. [270]

No work has been done on any of the head-gates or flumes on the tract.

Views #5, #6 and #7, Roll #3 show the rock formation on the Lower North Canal. This canal runs through the lava rock for the first twelve miles of its length. At places the banks have been made from borrow-pits, and the embankment rests upon the lava at the top of the ground. When possible the ground beneath the embankment has been scored, but at a few places the rocks have made this impossible. The earth in these embankments is very fine, but considerable seepage will probably occur between the face of the rocks and the embankment.

The telephone lines between Mackay and the Dam and from Moore to the Diversion Dam above Dar-

(Testimony of Paul S. Roberts.)

lington are completed, and communication established.

The work in general is in good shape and progressing rapidly."

Q. When you made this report, Mr. Roberts, you made a report you thought was true?

A. Yes, sir.

Q. And it was true?

A. I think so, in the main. (549.)

Q. Have you any explanations to make now that it wasn't true in any respects, or incorrect, rather?

A. I think not; the report takes care of that—it says "in general," I believe you read.

Q. You thought the sheet steel piling was all right on the 27th day of May, 1910?

A. That was before they drove any that I saw driven; there was some in at that time. [271]

Q. Did they drive any sheet piling while you were there? A. Yes, sir.

Q. Do you know about how much they drove?

A. What do you mean, for length, along the trench?

Q. How many feet lengthwise of the dam or up and down the dam? A. Lengthwise of the dam?

Q. Yes, lengthwise of the dam.

A. I should judge around, well, forty feet, as I remember it, about that.

Q. Do you know about how much sheet piling was driven there lengthwise of the dam?

A. No, I don't know, not as to the total distance. I had reason to believe that some of it had been

(Testimony of Paul S. Roberts.)

covered up by the concrete; there was some in evidence when I was there, however.

Q. You spoke of that in one of your letters, didn't you, that Mr. Drummond, the engineer in charge, had a way of doing away with some of the piling?

A. Yes, sir.

Q. What sheet piling you saw driven, was it in accordance with the plans and specifications?

A. I think so, yes, sir.

Q. Do you know how much longer, after May 27, 1910, did they drive steel piling? (550.)

A. I don't remember. Probably the next report will mention the fact. Whether it will give dates or not, I don't know.

Mr. HENDERSON.—Gentlemen, I will look over this, and if I don't want it I won't put it in.

Mr. POWELL.—If you do I wish you would offer it and not read [272] it into the record; you can offer it and substitute a copy for it, and not encumber the record in this way. I have no question but what Mr. Roberts will let the reporter take them and write them into the record, if you want to, without taking this time to read them.

Mr. HENDERSON.—Q. Up to May 27th, while you were there on the works the dumping of the material on the dam was done according to the plans and specifications, was it not?

A. I think there was one track used crossing the dam.

Q. I am talking about May 27, 1910, now.

A. Well, I don't know whether there was any

(Testimony of Paul S. Roberts.)

dumping done from this track on the so-called first lift—not trestle, but track—on the first lift. They may have been dumping from that previous to May 27th, but that track was in existence at the time of my coming there, and although it may have been contrary to the specifications the fact that it was still continued left me no choice in the matter.

Q. Did you see them dumping any gravel from track? A. From the track, yes.

Q. You didn't find any fault with that in your report of May 27th?

A. That was all taken up with the state engineer; he understood thoroughly about that matter. We had a thorough understanding, so that it will not appear in the reports. (551.) It was understood between myself and the state engineer that that particular feature would be allowed, since it had been allowed previously under a previous state engineer.

Q. You knew about the plans and specifications for puddling, did you not? A. Yes, sir. [273]

Q. Was that done to your satisfaction while you were there? A. No, sir.

Q. You didn't make any mention of that in your report?

A. I did in a later report, you will find, yes, sir.

Q. I mean you didn't make any complaint on May 27th?

A. I don't know as to that; I don't remember the date now.

Q. You just heard me read that report of May 27th, didn't you?

(Testimony of Paul S. Roberts.)

A. No; in that report, I don't think there was any comment made in that.

Q. Up to May 27th, 1910, was the puddling that you saw done to your satisfaction?

A. The puddling that I saw was done according to the previous plans and under the previous inspector, and I continued the work, allowed the work to continue without comment on that account. I don't know now whether it was satisfactory to me or not. I don't remember at that time whether I had decided as to its satisfaction or not, as far as I was concerned.

Q. But you didn't find any fault with it?

A. I made no mention of it, no, sir.

Q. And those things that you thought of sufficient importance you called to the state engineer's attention, did you not?

A. If I believe that he did not know of the existence of the matters, I did; if I knew that he knew about them I wouldn't necessarily direct his attention to them again. (552.)

Q. Did he know about the puddling?

A. Yes, sir.

Q. And he let it go on?

A. He didn't stop it; it did go on.

Q. How was that puddling done there while you were there? [274]

A. By a stream of water from an inch and three quarters or two-inch nozzle.

Mr. HENDERSON.—Without reading this, I wish this report of June 28, 1910, to go in.

(The following is a copy of said report:)

(Testimony of Paul S. Roberts.)

"Mackay, Idaho, June 28, 1910.

BIG LOST RIVER LAND & IRRIGATION CO.

Hon. D. G. Martin,

State Engineer,

Boise, Idaho.

Sir:

I beg to submit herewith report on the progress of the work of the Big Lost River Land & Irrigation Co.

MACKAY DAM.

The up-stream section of the second lift of the embankment was finished on June 2d, and the dumping toward the core wall, with the necessary shifting of track, begun. On June 3d, the water had risen in the reservoir, until it stood several feet above the base of this second lift. The large stones which formed the base of this lift allowed the water to pass through the embankment. This seepage amounted to fifty second feet. In order to stop this seepage, a stream of water was played on the up-stream face of the embankment and the foot of the embankment was puddled sufficiently to stop all seepage at this point. (553.)

Film No. 4 shows the dumping on the second lift toward the core wall.

The upstream face of the second lift of the embankment has been dressed to proper slope.

The steel sheet-piling was continued from the intended [275] point of stopping, a distance of 80 feet to the base of the rock cliff at the west end of dam. The lengths of piling ranged from 18 feet at

(Testimony of Paul S. Roberts.)

the river end of this section to 9 feet at the cliff end. Each pile was driven to refusal, the last foot with considerable difficulty, indicating a compact stratum at the foot of the piling.

After the forms for the concrete were in place around the sheet-piling, the gravel within the forms was excavated to a firm foundation for the concrete. This excavation was about five feet below the original surface of the ground. Considerable water stood in the forms when the concrete was placed, but there was no perceptible flow, and the concrete was so placed as to cause no separation of the cement and gravel.

From the end of the sheet-piling, to the perpendicular face of the rock cliff, the earth and float-rock was removed to solid rock. A centrifugal pump working continuously during the excavation, kept the considerable amount of seepage water pumped out which allowed this excavation to be easily and thoroughly done.

Film No. 3, Roll No. 3 shows the foundation course for the core wall being placed, and Film No. 2, Roll No. 3 shows the excavation in the rock for the core-wall at this end of the dam.

Film No. 5 and Roll No. 3 shows the first lift of the embankment at the lower toe of the dam. This lift is completed to within 100 feet of the west end of the dam. (554.)

Film No. 1 Roll No. 3 shows the wooden covering over the three valves at the outlet tunnel, next to the rock. This covering is made of 12"x12" timber up-

(Testimony of Paul S. Roberts.)

rights, with 12"x12" timbers placed close together forming a tight roof. The timbers are fastened together with half-inch iron dowel pins 16 inches long driven with sledges. The other three valves will not be covered. [276]

Film No. 6, Roll No. 3 also shows the method of forming the second lift of the embankment toward the core wall. It also shows the concrete gang taking the material from the embankment for the concrete of the core wall.

This view further shows the trestle being built for the third lift of the embankment toward the east end of the dam. This trestle extends from the present end of the third lift at the upstream face of the dam, across the embankment and core wall at an angle of forty-five degrees, to the lower side of the dam. It is the intention of the contractor to begin dumping at the upstream end of the trestle where the third lift now ends, and continue across the dam to the lower side and then parallel to the dam to the cliff at the west end. This method is directly opposed to the specifications which say: Page B13, paragraph 8, Forming Embankment—"by placing two trestles, one in the lower toe, and one in the upper toe of the rising embankment. The material between the trestles may be dumped from the cars toward the center of the dam, taking the general slope determined by the angle of repose of the material as dumped; the only limitation being that each trestle shall be used to the extent that practically the same weight of material is carried toward the center of the dam from

(Testimony of Paul S. Roberts.)

each trestle.' It is obvious that the intended method of forming this portion of the third section of the embankment will not cause the same weight of material to be (555.) carried towards the center of the dam from each trestle. I took this matter up with Mr. Jones, the Engineer of the work, but he seemed to think the intended plan was all right, in that it was easier for the contractor to do it this way. I insisted that the specifications be followed strictly.

No work has been done on the spill-way, as the blasting [277] rolls rock and dirt into the excavation for the core wall below the spill-way, preventing the continuing of work on the core wall.

Work on the dam has been considerably delayed during the last month on account of delayed shipments of coal.

ERA TRACT.

Film No. 6, Roll No. 1, shows the lower flume on Eden lateral. This flume is finished and water is now running in the lateral. The concrete work at both ends of the flume is poor. It is rough and broken at the edges. At the lower end of the flume there is a little leakage around the concrete. This will probably all be stopped as the bottom and sides of the ditch become puddled. The flume is the Maginnis type and well built. It is 550 ft. long and does not leak at any of the joints. The supporting wood-work is of clear lumber of good size and all well bolted together. Film No. 7, Roll No. 1, shows the details of the supporting timbers.

Film No. 8, Roll No. 1 shows the upper flume on

(Testimony of Paul S. Roberts.)

the Eden lateral. This flume is 971 feet long, also of the Maginnis type. It is also well built and tight at the joints. The concrete work at the ends of the flume is very good and there is no leakage around the concrete.

The concrete head-gates for the laterals on this tract are finished. They are all standard type. No gates have been placed. Film No. 9, Roll No. 1, shows the head-gate on Economy Lateral. The upper wing wall is badly cracked. This creek (556) extends entirely through the wall and from top to bottom. This wing wall will have to be removed and rebuilt.

Water was admitted to the Eden Economy & Ebony laterals of this tract, about June 10th. [278]

Film No. 10, Roll No. 1, is a view of a portion of Economy lateral 100 feet below the head-gate, and shows the water washing the banks and bottom of the lateral. The head-gate is near the center of Section 3, T. 3 N., R. 35 E., and the lateral runs east from the main canal. From the head-gate to the E. $\frac{1}{4}$ corner of Section 3, a distance $\frac{1}{2}$ mile, the grade of the lateral is too steep. The ditch is now carrying about one-half its capacity and is eroding the sides and bottom of the lateral for this entire half-mile. Beyond this section of the lateral, the grade is less steep, and the water is not eroding the banks. Some provision will have to be made to prevent this erosion on the first half-mile of this lateral.

Material for the flumes on the Elm and Elm No.

(Testimony of Paul S. Roberts.)

2 laterals is now being hauled from Arco.

Film No. 1, Roll No. 2, shows the opening in the banks of the lower Blaine Canal for a syphon of a private ditch. There are two such places on this canal, the conditions at both being shown in this view. Nothing has been done on the concrete work at either place.

Film No. 2, Roll No. 2, shows a gravel pit in the bottom of the lower Blaine Canal, below Drop No. 3. This excavation is to be filled after the concrete work is finished.

Film No. 3, Roll No. 2, shows the form work at Drop No. 2 ready for the concrete.

Film No. 4, Roll No. 2, shows the finished concrete basin at the end of the 1400 feet concrete chute at the head of the Lower Blaine Canal. This is very good concrete. (557.)

Film No. 5, Roll No. 2, shows the forms in place above the basin at the end of the chute, and Film No. 6, Roll No. 2, shows the concrete head-gate and the upper end of the long chute. Temporary wooden gates are still serving at this head-gate.

[279]

No expansion joints were being built in the long concrete chute as recommended by Mr. Martin to Mr. Stevenson on May 25th. The concrete is being placed in alternate and opposite sections, each six feet wide, extending from the bottom of the canal to the top. After these alternate sections have set, the intervening sections are placed. The bottom of the canal is then concreted as far as the sides have

(Testimony of Paul S. Roberts.)

been finished. The first 50 feet of this chute is well done, the concrete is smooth and hard and no joints show. Beyond this strip, the joints are opening as the concrete in the 6 foot sections become hard. The cracks extend from the bottom of the canal to the top of the bank, but do not extend across the bottom of the canal, as this bottom concrete is placed after the sides have become hard, and in one section extending past several side sections, in lengths averaging 50 feet. When Chief Engineer Drummond's attention was called to the matter of no expansion provision being made, he contended that the cracks between the 6 ft. sections would act as sufficient expansion joints. As these cracks extend only down the sides and not across the bottom it is obvious that they would not serve as expansion joints. Further these joints will admit water to the ground beneath the concrete which will heave and displace the concrete the entire length of the chute, at the first frost.

I took this matter up with Mr. Osborne, the Engineer in charge of this work. He agreed to have all joints made tight, and to put in expansion joints of tarred felt, as often as every 200 feet. (558.)

This concrete work has been delayed a good deal during the last month. This was partly due to delayed shipment of cement, and to the fact that the contractor was working on the Arco Head Gate and the head-gates of the laterals on the Era Tract.

(Testimony of Paul S. Roberts.)

ARCO TRACT.

Film No. 3 and 4, Roll No. 1, show the river and canal faces respectively, of the concrete head-gate on the Arco Canal. This concrete is good work. The Gate proper has not been placed.

The face of the head-gate is 10 feet back from the river bank. A temporary excavation from the river to the head-gate has been made with perpendicular dirt banks. All the earth between the wing walls and the river is to be excavated later, and hand laid riprap placed at the base of the concrete wing-walls.

Considerable difficulty was experienced in excavating for the footings of the wing and cut-off walls, on account of the water seeping through from the river into the excavation. By keeping two pumps working continuously, the contractor was able to keep the water down sufficiently to allow him to excavate to the required depth.

Film No. 5, Roll No. 1, shows the rock dam across the river at the Arco Canal head gate. This dam is built of rocks of one-half to one cubic foot of size. It is 10 feet wide on the bottom and 4 feet high, the crest having a width of a single row of stones. The elevation of the bottom of the Arco Canal at the head gate is 2 feet 8 inches above the bottom of the river. The dam raises the water to an elevation of 1 ft. and 4 inches, above the bottom of the canal. This dam will be (559) washed out by high water. It will serve for the present season, but I would recommend that a more permanent structure be placed here before next season of high water. By widen-

(Testimony of Paul S. Roberts.)

ing the dam with more and larger stones a permanent and sufficient structure would be built.

Work was begun on this head gate June 6th and water was admitted to the canal on June 14th.

Nothing has been done toward bringing the embankment up [281] to grade as noted in report of May 27th.

The permanent head gates of laterals on this tract have not been built.

Film No. 1, Roll No. 1 shows the form work for the concrete of the head gate on the North Canal at the Diversion Dam below Powell. Eight carpenters are working on these forms, which were ready for the concrete on June 21st. Cement is at the site and the concrete mixer was being moved from Drop No. 4 to the head gate, to begin the concrete work on June 22nd.

The iron segmental gates for this head gate have arrived at Powell. One of these gates had been hauled to the site, and six men were unloading the other two from the car at Powell on June 22nd. Film No. 2, Roll No. 1, shows the placing of one gate, to a wagon, from the car ready to be hauled to the diversion dam.

The first four Drops on the North Canal are finished. This is all good concrete work. There is no concrete work, and no form work, finished below Drop No. 4.

The concrete work has been delayed three weeks for lack of cement, which has been caused by delays in shipment.

(Testimony of Paul S. Roberts.)

The lumber for bridges is being hauled from Powell, but none of these structures have been built. (560.)

Work on the flumes has not been started.

The excavation for canals and laterals is progressing rapidly. This work is practically completed to within a few miles of the lower end of the tract.

OBSERVATIONS ON FLOW OF BIG LOST RIVER.

Maximum high water occurred on June 3rd at Mackay dam, flow on this date estimated 1600 second feet. On June 27th, flow at Mackay dam 800 second ft. [282]

At Powell on June 21st flow was 80 second feet. Twenty miles below Powell on same date, no flow.

This lack of water in the river will stop work on the canals and laterals except those near enough to Little Lost River to haul water from that stream.

On June 17th, Mr. J. B. Lippincott, Engineer, of Los Angeles, Cal. arrived at Mackay to make an investigation of the conditions at the dam, in the interest of residents and property owners of Mackay. Mr. Lippincott's investigation was most thorough, ending on June 20th at Blackfoot with an interview of Mr. Munson, who did the boring at the dam-site for bed rock. Mr. Lippincott's report, which will not be favorable, is expected about July 10th.

The working force on the project is as follows:

95 men.

13 teams.

2 steam shovels.

(Testimony of Paul S. Roberts.)

5 locomotives.

50 dump cars.

2 concrete mixers.

Canal System.

3 concrete mixers.

2 ditching machines.

280 teams.

460 men. (561.)

I am mailing under separate cover, three (3) rolls of films, one of ten (10) exposures, and two of six (6) exposures each.

Roll No. 1. 10 Exposures.

Film No. 1—From work for head gate of North Canal at Diversion, below Powell.

2—Gates for North Canal, being taken from cars at Powell.

3 & 4—Arco Canal head gates above Arco. [283]

5—Rock Dam across river at Arco Canal Head gate.

6—General view of lower flume on Eden Lateral Era Tract.

7—Details of flume on Eden Lateral.

8—General view of upper flume on Eden Lateral.

9—Head Gate of Economy Lateral on Era Tract.

10—Portion of Economy canal below head gate showing eroding of bank.

Roll No. 2.

Film No. 1.—Opening in banks of Lower Blaine canal for siphon of private ditch.

(Testimony of Paul S. Roberts.)

- 2—Gravel pit in bottom of lower Blaine canal below Drop No. 3.
- 3—Form work for concrete at Drop No. 2 Lower Blaine canal.
- 4—Concrete basin at end of 1400 ft. chute Lower Blaine Canal.
- 5—Forms for concrete at end of 1400 ft. chute above basin.
- 6—Head Gate for Lower Blaine Canal.

Roll No. 3.

- Film No. 1.—Timber covering over west set of controlling valves at Mackay Dam.
- 2—Excavation in rock at west end of dam for core wall.
 - 3—Placing footing course of concrete core wall at west end of dam. (562)
 - 4—Building of second lift of Mackay dam.
 - 5—Building of first lift at lower toe of Mackay dam.
 - 6—Shows dumping on second lift of Mackay dam; taking material from the embankment to make concrete of core wall; building trestle across dam for third lift of embankment.

Respectfully submitted,

Carey Act Inspector. [284]

(Rubber stamp:) Received in the State Engineer's Office July 1, 1910."

Mr. HENDERSON.—Q. Now, Mr. Roberts, where is that picture that you said showed the sagebrush on the site of the dam, upon which the dam was built?

A. I don't think I said sagebrush. I think I said

(Testimony of Paul S. Roberts.)

vegetation. It was grass or sod, perhaps.

Q. Well, I don't know that I got your words just right—whatever you said.

A. There is one—that is the one right there that shows the vegetation.

Q. When did you take that? I show you now Defendants' Trustees Exhibit No. 39, and ask you when you took that.

A. I believe it was about July the 7th or 8th, if I remember correctly.

Mr. POWELL.—I suggest, Judge Henderson, that the original photographs and the original report, with photographs attached, is here in court, and the witness might be permitted to look at them to fix the date.

Mr. HENDERSON.—Yes, look at that.

(Witness did so.) (563.)

A. That is July 30th—that is as close as I can identify it—1910.

Q. When was the work stopped on the dam?

A. July 23d, I believe, 1910.

Mr. POWELL.—July or August?

Mr. HENDERSON.—July.

Q. Can you fix about the date now that you took Exhibit 39?

A. No, not any closer than that. It was after the dumping [285] started across the trestle, and if the report is dated July 30th it must have been previous to that time or it wouldn't be in the report. That is as close as I can fix the date, between the 6th and the 30th.

Q. Do you know what bond plowing is?

(Testimony of Paul S. Roberts.)

A. Yes, sir.

Q. How is it done?

A. Turn the soil, scratch the soil, to leave it rough in order that one fill may knit to the one already in place.

Q. At what part of the dam was this picture taken?

A. That is just to the left of the river bank. This is either the original surface, or probably been some material on there, but I doubt it very much.

Q. Will you look at that with a glass and take a lead pencil and mark where you see vegetation?

A. I don't need the glass. Have you got a lead pencil?

Q. Don't mark but just a little place.

Mr. POWELL.—Don't cover up the grass.

A. Within the red circle. You can see it there; it is a little red.

Mr. HENDERSON.—Q. How far is that away from the base of the dam?

A. I don't know what you mean by the base of the dam—the upper toe, lower toe—? (564.)

Q. Lower toe.

A. Probably 40 feet; it is in front of the core-wall.

Mr. MILLER.—What do you mean by in front of the core-wall?

A. Upstream side of the core-wall. [286]

Mr. HENDERSON.—Q. When you made that report on July 28th none of the dam had been built on any land that hadn't been bond plowed, had it?

A. I don't remember all the things in that report; I couldn't say without reading over the report.